(27,556)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 279.

ANNA HEITMULLER, PLAINTIFF IN ERROR,

vs.

SYLVANUS STOKES.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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1 Court of Appeals of the District of Columbia.

No. 3273.

ANNA HEITMULLER, Appellant,

vs.

SYLVANUS STOKES.

Supreme Court of the District of Columbia.

At Law. No. 62067.

SYLVANUS STOKES, Plaintiff,

vs.

ANNA HEITMULLER, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

Complaint.

Filed January 8, 1919.

In the Supreme Court of the District of Columbia.

62027.

In the Municipal Court of the District of Columbia.

L. & T., No. 166,957.

SYLVANUS STOKES, Plaintiff,

vs.

ANNA HEITMULLER, Defendant.

Your complainant, Sylvanus Stokes, being first duly sworn according to law, states that he is entitled to the possession of the
2 premises known as Number 1505, 22nd Street, Northwest, located in the City of Washington, District aforesaid, and that the same is unlawfully detained from him without right by the de-

fendant to whom The Washington Loan and Trust Company had heretofore rented the said premises by the month, and whose tenancy and estate has been determined by the service of a due notice to quit. Said premises were, to wit, on the 2nd day of October, 1918, purchased by the plaintiff for his own occupancy, and the plaintiff is a bona fide purchaser of said premises which are reasonably required by him for the occupation of himself and his family. The agreement by which said premises were rented to said defendant was duly assigned in writing to the plaintiff.

Complainant therefore prays that a summons may be issued, commanding the defendant to appear and show cause why judgment should not be given against her for the restitution of the possession of said premises, and costs of this suit.

SYLVANUS STOKES.

Subscribed and sworn to before me this 2nd day of December, A. D. 1918.

WM. C. WORTHINGTON, [SEAL.]
Notary Public, D. C.

[SEAL.]

Summons.

* * * * * * *

The President of the United States to the defendant, Anna Heitmuller, Greeting:

You are hereby summoned to appear in this Court on the 13 day of December, A. D. 1918, at 10 o'clock, A. M. to answer the plaintiff's complaint and show cause why judgment should not be given against you for the restitution of the possession of the premises described in the complaint under oath herein filed by said plaintiff, and costs of this suit, and in case of your failure so to appear and answer, the suit will be proceeded with as in case of default.

Witness the Honorable Judges of said Court this 2 day of December, A. D. 1918.

BLANCHE NEFF, [SEAL.]
Clerk,
By R. H. ROLLINS,
Assistant Clerk.

1.00 Pd. Clerk.

Marshal's Return.

Dec. 2nd, 1918. Summoned as within directed.

MAURICE SPLAIN,
U. S. Marshal,
JAS. H. McGILTON,
Dep.

3 *Memo.*

Jany. 4th, 1919.—Judgment for defendant—(after trial)—(Public Resolution #31 May 31, 1918.)

G. C. AUKAM,
Judge.

Certificate of Municipal Court on Appeal.

* * * * * * *

Date.	Proceedings.
1918.	
	Plaintiff's attorney—W. E. Lester.
	Defendant's attorney—C. Brown.
Dec. 2nd.	Sworn complaint filed.
" "	Summons and copy issued returnable Dec. 13—10 A. M.
" "	Summons returned, "summoned as within directed."
" 13th.	Continued by defendant to Dec. 21—10 A. M.
" 21st.	Judgment after trial for defendant for costs.
1919.	
Jan. 4th.	Appeal, notice of, filed. Set for Jan. 8—10 A. M.
" 6th.	Appeal, undertaking on, with S. Stokes, Jr., surety, approved and filed.
" 7th.	Appeal, record on and papers filed with Clerk of Supreme Court D. C. and notice sent to plaintiff's attorney.

This is to certify that the foregoing is a true copy of the Docket Entries and of all the proceedings had before the said Court in the above cause, and that the annexed documents are all the original papers filed in said cause.

Witness the Honorable Judges of said Court this 7th day of January, A. D. 1919.

BLANCHE NEFF,
Clerk.

Costs paid by Plaintiff, $3.85.
Costs paid by Defendant, $.25.

(Endorsed.)

The Clerk will please docket this appeal, enter my *our* appearance.

WHARTON E. LESTER,
Atty. for Appellant.

4 *Affidavit of Plaintiff.*

Filed January 8, 1919.

* * * * * * *

DISTRICT OF COLUMBIA, ss:

Being first duly sworn according to law, I do make oath and say: I am the plaintiff above named and am advised and therefore aver, that I have a just right to recover possession from Anna Heitmuller, the defendant aforesaid, of premises known as number 1505 22nd Street, Northwest in the City of Washington, District of Columbia, and described in the complaint filed herein, because of the following facts:

I am a bona fide purchaser of said premises which I bought for the occupancy of myself and family. I purchased said property on the 2nd day of October, 1918, by deed bearing that date and duly recorded amongst the land records of the District of Columbia on the 3rd day of October, 1918, in Liber 4089 at folio 448, intending to reside therein with my family.

The said defendant occupied said premises at the time of the purchase by me as aforesaid, under an agreement duly executed by the parties thereto and being in the following words and figures,

"This agreement, made this 4th day of Sept., 1912, between The Washington Loan and Trust Company, a corporation existing under and by virtue of the laws of the United States, of the first part, and Mrs. Anna Heitmuller party of the second part, of the City of Washington, District of Columbia, Witnesseth that the said party of the first part has let and hereby does let, to the said party of the second part the premises known as 1505 22nd St. N. W. in said City (the same being a dwelling) by the month commencing on the first day of Sept., A. D. 1912, at and for the monthly rent of thirty-two 50/100 dollars, payable at the office of The Washington Loan and Trust Company, in advance; that is to say, on said first day of each month during said tenancy as rent in advance for the next ensuing month.

And the said party of the second part has agreed to take, and does hereby take and hold the said premises as tenant by the month, at the said rent, payable as aforesaid, and agrees that she will pay the gas bills as they become due, and that she will not sublet or assign the said premises or carry on any business therein, except that of dwelling, without the written consent of the said Lessor, its Successors or Assigns, or use the same for any disorderly or unlawful purpose.

Provided, That if the said Lessee shall fail to pay the said rent in advance as aforesaid, although there should have been no legal or formal demand for the same, or shall neglect to pay the gas bills at the time or on the day when the same shall fall due and be payable as

hereinbefore mentioned, or shall sublet or assign the said premises, or carry on any business therein, except that of dwelling aforesaid, without the written consent as aforesaid, or shall use the same for any disorderly or unlawful purpose, or break either of the aforesaid covenants; then, and in either of said events, this agreement, and all things herein contained, shall cease and determine, and shall operate as a notice to quit, the thirty days' notice to quit being hereby expressly waived. And the said Lessor, its Successors and Assigns, shall and may proceed to recover possession of said premises under and by virtue of a seven days' summons as provided by law; but if no default occurs on the part of said Lessee then she shall be entitled to not less than thirty days' notice to vacate the house and premises, which notice shall be given in writing, at least thirty days before said tenancy is intended to be terminated, and the said Lessor, its Successors and Assigns, shall be entitled to the same notice from the Lessee should she desire to vacate the aforesaid house and premises.

And it is further provided, That if under the provisions of this agreement a seven days' summons shall be served and a compromise or settlement shall be made thereupon it shall not constitute a waiver of any covenant herein contained. And the said Lessee hereby agrees to deliver the house in the same order in which it was received, usual wear and tear, fire and storm excepted; and it is hereby agreed that no waiver of one breach of any covenant herein contained shall be construed to waive or in any manner affect the covenants of this agreement.

The party of the second part further agrees to repair all damage to the plumbing, such as the stoppage of drain pipes, the bursting of pipes by freezing and all other damage to the plumbing at her own cost and expense.

And it is further agreed that the said party of the first part, its Successors and Assigns, shall not in any manner be liable for any diminution of the term hereby created, or for any interference with said Lessee's possession of said property.

In testimony whereof the said party hereto of the first part has caused these presents to be executed by its Vice President and said party hereto of the second part has hereunto set her hand and seal on the day and year first hereinbefore written.

THE WASHINGTON LOAN AND TRUST COMPANY,
By ANDREW PARKER,
Vice-President.
MRS. A. HEITMULLER. [SEAL.]

Witness:
R. D. HUNT.

Thereafter the said agreement was duly assigned by the lessor therein named by writing thereon duly executed and in the following words:

6 "Washington, D. C. For value received we hereby transfer and assign unto New York Real Estate Brokers, all of our right, title, and interest in and to the within lease.

THE WASHINGTON LOAN AND TRUST CO.
THOMAS BRADLEY,
Real Estate Officer.

The said grantee in said assignment, the New York Real Estate Brokers collected rent for said premises from said defendant, under said agreement for several months and was the landlord, *under* premises under said agreement at the time of the purchase aforesaid by affiant, and thereafter, duly assigned said agreement to affiant by writing duly executed by it in the following words and figures.

"Washington, D. C., October 4th, 1918.

For value received we hereby transfer and assign all our right, title and interest in the within agreement to Sylvanus Stokes.
NEW YORK REAL ESTATE BROKERS,
By N. E. RYON."

I further say that my object in purchasing said property was to obtain a home. Until a few weeks prior to said purchase I occupied as a tenant a house in said City which was desired and taken by the United States Government for "war workers," and upon such act being done I at once looked for a house to purchase for I was wholly unable to rent premises in which to live. After removing from said house so taken by the United States Government I went to a hotel in said City where I lived for a number of weeks; my wife going out of the City to live temporarily with our married daughter. I am now residing in an apartment with my wife which is leased to a tenant who is temporarily absent from the City and who has let me have it at nearly three times the rental she pays therefor with the agreement on my part that I shall vacate the same upon her return to the City from which she has gone temporarily. The return of said tenant is imminent and may be any day and is expected within the near future and is a matter over which I have no control. I have no other premises and know of none I can obtain in which to reside for although I own other real estate in this City it is all under lease and I cannot obtain possession of any part thereof during the existence of the present war.

I further say that the defendant is not a war worker, is not in the employ or in the military service of the United States Government and that at the trial in the Court below she did not testify and offered evidence only on the question whether or not I could obtain other living quarters.

After taking title to said premises, I did, on the 30th day of October 1918, endeavor to serve a notice to quit said premises on the defendant, but being unable to serve same personally, served the

same by causing such notice to be tacked to the front door of
7 said premises, and thereafter on the 31st day of October served such notice on the defendant who at the trial in the Municipal Court acknowledged to have received it. Said notice so served on October 31st, was in the following words and figures.

"October 31, 1918.

Mrs. A. Heitmuller, 1505 22nd Street, Northwest.

DEAR MADAM:

You are hereby notified that I have bona fide purchased premises known as 1505 22nd Street, Northwest, in the City of Washington, District of Columbia which you occupy under an agreement with the Washington Loan and Trust Company, dated Septeber 4, 1912, for occupation for myself and family, and that said premises are necessarily required by me for my own occupancy and that of my family. The said agreement has been duly assigned in writing to me and as I am desirous to have possession of said premises for the occupancy of myself and family, I hereby give you notice to remove from and quit said premises at the expiration of your month's tenancy which expires next after thirty (30) days after the service of this notice, and with the month of November 1918.

SYLVANUS STOKES."

Said notice was identical with the notice attached to the door of said premises on October 30 except the date thereof which was October 30, 1918.

Affiant further says that defendant contended that the Act of Congress approved May 31, 1918, commonly called "The Saulsbury Resolution" protects her in the occupancy of said premises, but affiant is advised and therefore avers that said act has no application to the existing conditions above set forth, but specifically exempts from the operation thereof a bona fide purchaser of real estate for his own occupancy, and that he is a bona fide purchaser of said premises for his own occupancy. He is further advised and therefore avers that said Act of Congress is unconstitutional and void.

I further say that said property was sold to me on the date and as aforesaid, bona fide, and for my own occupancy, that I am in immediate need of said premises for my own occupancy, that my present abode is wholly insufficient for my family and my occupation thereof is liable to terminate on any day by the person under whom I occupy the same, who I am informed and therefore aver is in the employ of the United States Government. I further say that the said premises sought to be recovered consist of a lot improved by a dwelling house.

SYLVANUS STOKES.

Subscribed and sworn to before me this 8th day of January, 1919.

SCOTT F. KITTREDGE,
Notary Public, D. C.

[SEAL.]

8 *Demand for Trial by Jury Made by Defendant.*

Filed January 18, 1919.

* * * * * * *

And now comes the defendant, Anna Heitmuller and demands a trial by jury of the questions of fact involved in the above entitled action, upon the grounds, among others as follows:

First. Section 80 of the Code of Law for the District of Columbia, provides that in such actions on appeal to the Supreme Court of the District of Columbia, "either party may demand a trial by jury"; and this defendant now makes demand in accordance with the right granted her by said section 80.

Second. Section 1232 of said Code, provides that "such appeal" (in landlord and tenant proceedings) "shall be tried in the Supreme Court" (of the District of Columbia) "in the same manner in which appeals from justices of the peace" (now Municipal Court) "are taken and tried in other cases." And in all other cases of such appeals, this defendant is advised, and avers, they are not tried on affidavits such as is provided for in landlord and tenant proceedings on appeal by law rule 19 of this Court; and which law rule 19, is therefore, contrary to, and against the law, and the statute in such case made and provided. (Section 1232, Code D. C.)

Third. The Supreme Court of the District of Columbia, it is respectfully submitted and claimed by this defendant, was and is without authority of law, to pass or enact the provisions and requirements contained in said law rule 19, in this, that Section 32 of said Code provides that where it—the said Code—has provided for the manner in which such a suit shall be tried on appeal, then in such case, the manner so provided for trial by said Code, shall exclusively govern, and such trial shall not be governed by any rule of said Court.

Said section 32 of said Code provides as follows:

"Practice."—The practice and forms of proceeding before justices and in trials of appeals from justices, so far as not herein directed, shall be governed by the rules of said Supreme Court"; and section 80 of said Code having directed, as hereinbefore set forth, that "either party may demand a trial by jury," said law rule 19 can apply and govern, if it apply or govern at all, only to those cases on appeal in which "a trial by jury" is not demanded by "either party."

Fourth. Because the defendant is entitled to a trial by jury under the seventh amendment to the Constitution of the United States, and which trial by jury she now demands; and because also the said proceeding for trial on affidavits as provided and required by said law rule 19, is contrary to the fifth amendment to the Constitution of the United States, in that it would or might deprive the defend-

ant of her property without due process of law, as well as con-
9 trary to other provisions of the said Constitution which will be presented in open Court upon any hearing of this suit.

Fifth. Because the proceedings attempted by the plaintiff is not one involving matters ex contractu between the plaintiff and this defendant, but are in their nature ex delicto, and said law rule 19 was not intended to apply and does not appiy to matters ex delicto.

ANNA HEITMULLER,
Defendant, in Proper Person.

DISTRICT OF COLUMBIA, *To wit:*

I verily believe the statements made in the foregoing paper signed by me are true.

ANNA HEITMULLER.

Subscribed and sworn to before me this 18th day of January 1919.

[SEAL.] CHAS. H. BAUMAN,
Notary Public, D. C.

Affidavit of Defendant under Rule 19.

Filed January 20, 1919.

* * * * * * *

DISTRICT OF COLUMBIA, *To wit:*

Anna Heitmuller, being first duly sworn, according to law, deposes and says: That she is the defendant in the above entitled cause, and that she does not by making and filing this her affidavit provided for in Law Rule 19 of this Court, in any way waive her right of trial by jury demanded by her in a paper-writing signed by her and filed in the clerk's office of this Court on, to wit: January 18, 1919, to the credit of this case, which demand in writing she prays may be heard and determined by this Court in connection with the matters and things contained in this, her present affidavit; and that if her demand for a jury trial,—if the Court considers it has jurisdiction of this proceeding,—is refused by this Court, she may be granted her exception to the Court's adverse ruling and her appeal therefrom. With this reservation and exception, this defendant now says that she denies the right of the plaintiff to the possession of the property in question, to wit: premises No. 1505 22nd street, Northwest, in the City of Washington, District of Columbia; and the grounds of her defense are as follows:

First. This defendant is advised by Counsel learned in the law, and upon such advice, avers, that in order for the plaintiff to maintain the present proceedings against this defendant, the relation of

landlord and tenant must exist, or must have existed, between the plaintiff and this defendant. And this defendant avers the
10 fact to be that she has never been the tenant of the said plaintiff Sylvanus Stokes, and is not now his tenant, and she further avers that she has never had any contractual relation of any nature whatever with the said plaintiff. This defendant further avers that while the plaintiff fails to disclose in his affidavit the name of the grantor through whom he claims title to said premises as the alleged purchaser thereof, yet this defendant is informed and believes, and upon such information and belief affirmatively avers, and expects to prove at the trial of this case, if it ever comes to trial, that the name of the plaintiff's alleged grantor is one John H. Davidson, and this defendant further avers the fact to be that she has never had any contractual relations of any nature with said John H. Davidson, directly or indirectly; and that she was never his tenant, and she has no information that the said Davidson ever had any title or interest in said premises, and she does not admit that he has or ever did have. And the plaintiff not having alleged in his affidavit filed in this case, that the defendant is the tenant of the plaintiff, or that the said plaintiff is the landlord of the defendant, this defendant is advised by Counsel learned in the law, and therefore avers that the plaintiff is not entitled to any relief in this court in this landlord and tenant proceeding, and that the defendant is entitled to have this proceeding dismissed at the cost of the plaintiff; and this defendant so prays the Court; or if there be any doubt in the mind of the Court as to the undisputed facts in this regard, then the defendant respectfully requests, prays and demands a trial by jury upon this issue in accordance with the statute made and provided, (section 80 Code D. C.) and also as she is entitled by the fifth and seventh amendments to the Constitution of the United States.

Second. The second ground of defense of the defendant is, and this defendant avers (first): That the plaintiff is not a bona fide purchaser for his own occupancy, and (second): She avers that the said premises are not necessarily required by him for occupation either by himself, or his wife, children or dependents while he is in the employ of or officially connected with any branch of the Government. Some of the facts sustaining or tending to prove both the first and second allegations made next herein above by this defendant, and which facts, and others of a similar character, this defendant expects to produce and prove at the trial of this suit, if it comes to a trial before a jury (which jury trial she *respectively* prays and respectfully demands upon the grounds hereinbefore set forth), and which facts she learned either from the plaintiff himself or on information from reliable persons. The plaintiff is a person of large property interests, being the owner in the northwest section of the City of Washington, District of Columbia, of two large Apartment Houses, containing in the aggregate about fifty separate apartments. He formerly owned another large Apartment House which within the year last passed he sold to the United States Government for a

large sum of money, to wit: many thousands of dollars, the
11 exact amount this defendant has not been able to ascertain,
but which the plaintiff would be compelled to testify to on cross-examination at the trial of this suit. In addition to the said two Apartment Houses which the plaintiff now owns, he is building another large Apartment house in the Northwest section of the City of Washington, District of Columbia, on Massachusetts Avenue. The plaintiff is now occupying one of the apartments in the Apartment Houses which he owns.

The premises which the defendant occupies as tenant (not of the plaintiff) are not fitted for occupancy by a person of the plaintiff's financial means and social station. Its location is next to the rear door of a meat and vegetable market where boxes and barrels often containing fragments of decayed vegetable- and fruits are constantly thrown, piled and almost constantly remain in large quantities. This fact was, at the time of his alleged purchase, and is now known to the plaintiff. That when plaintiff came to the said premises occupied by this defendant he came with a man who judging from his appearance and conversation, was a carpenter or builder, and after the two examined the first floor of the premises which consists of a parlor, a dining room and a kitchen, the defendant talked with the person who came with him about the practicability or possibility of installing a shower bath in a part of the kitchen, to be partitioned off from the remaining portion of the kitchen,—a change or alteration which would not be necessary or even proper unless that first parlor floor was to be converted into an apartment or flat. He also inquired as to the possibility of converting one of the closets on the third floor, into a bath room, there being now a bath-room on the second floor, which while the premises are used as a dwelling house for a single family answer all the usual requirements and conveniences of a single family. These facts, and other cumulative facts of a similar nature, the defendant is prepared to,—and expects to submit at the trial of this suit, as tending to prove—according to the construction that the Court shall give to the law (Saulsbury Joint Resolution)—first, that the plaintiff did not purchase said premises bona fide for his own occupation; and second, that the said premises are not necessarily required for occupation, either by himself or his wife, children or dependents while engaged (or while not engaged) in the employ of or officially connected with any branch of the government.

Third. The third ground of defense is that the plaintiff is not in the employ or officially connected with any branch of the government. This fact is admitted by the plaintiff; but this defendant claims that the law requires that a bona fide purchaser shall be so employed.

Fourth. The fourth ground of defense is that the tenancy of the defendant has not been terminated, the law requiring that the notice to quit shall come from her landlord.

Fifth. The fifth ground of defense of this defendant is, That if the plaintiff claims that he has given the notice as landlord as re-

quired by the law, then he having entered into the relation of
12 landlord with this defendant, he is required to further show
that he is in the employ of the government, and that the premises are necessarily required for occupation by himself, and so forth, as provided in the said Saulsbury Joint Resolution, which it is not contended by him that he is in such employ.

Sixth. The sixth ground of defense of this defendant is, That the pretended assignment to the said plaintiff by the alleged New York Real Estate Brokers, of date October 4, 1918, of the alleged agreement set forth at length in plaintiff's affidavit of date Sept. 4, 1912, is illegal and void, in that if said New York Real Estate Brokers is a Corporation, then such alleged assignment is not executed in such a manner as to transfer, any interest in said alleged agreement or any right of action thereon or thereunder, and it prima facie appears from the form of said alleged assignment that said New York Real Estate Brokers is a Corporation. It further appears from said agreement dated Sept. 4, 1912, that it, and any cause of action based thereon is barred by the statute of limitations of three years, and this defendant avers that the alleged cause of action of the plaintiff based upon said alleged agreement did not accrue within three years next before the institution of this proceeding. This defendant further alleges that said agreement under the law was only valid for one year from its date, and that this defendant has held said premises since one year from the date of said agreement, namely, from Sept. 4, 1913, by verbal hiring, and that the pretended assignments both by the Washington Loan and Trust Co., and by the alleged New York Real Estate Brokers, transferred, for this reason, no interest to the plaintiff in her tenancy of said premises, and did not transfer to the plaintiff any right of action thereon or thereunder against this defendant.

Seventh. As a further, and seventh ground of defense of this defendant against the claim of the plaintiff as set up in his (plaintiff's) affidavit, this defendant says that she denies the truth of the allegation contained in plaintiff's affidavit that she (this defendant) "offered evidence only on the question whether or not I (the plaintiff) could obtain other living quarters"; and on the contrary avers that this defendant offered evidence in the trial in the lower court that she was dependent upon her son-in-law, Major Eugene M. Foster, of the United States Army, and who occupies the said premises with this defendant, and with his wife the daughter of this defendant, who (the wife of said Major Foster) also occupies said premises; and also an unmarried daughter of defendant occupies said premises with her. My daughter, the said wife of said Major Eugene M. Foster, so testified as above stated; and this defendant is prepared, and expects to offer testimony with same effect at the trial of this suit, if deemed pertinent and necessary.

Eighth. The eighth ground of defense is. That the plaintiff having alleged and claimed that said law (Saulsbury Resolution) is void, in the following language, to wit:

13 "He (plaintiff) is further advised and therefore avers that said Act of Congress is unconstitutional and void"

he (said plaintiff) is not entitled to, and can not receive any aid or relief from a Court of justice under said Act of Congress (Saulsbury Resolution).

Ninth. This defendant denies the allegation of the plaintiff in his said affidavit that the tenancy of the flat which he (the plaintiff) and his said family is now occupying is liable to terminate on any day by a person under whom he occupies the same, and that such person is in the employ of the United States Government, and avers that even if such be the case he has the protection of the provision of the law (Saulsbury Resolution) for such occupancy.

This defendant admits the allegation of the plaintiff in his said affidavit, namely that the said premises sought to be recovered by plaintiff from this defendant consists of a lot improved by a dwelling house, and avers that said house has eight rooms, three on two floors and two on the third floor, there being three floors, with a bathroom on the second floor.

ANNA HEITMULLER.

Subscribed and sworn to before me this 20th day of January 1919.

CHAS. H. BAUMAN,
Notary Public, D. C.

[SEAL.]

Motion for Judgment.

Filed January 21, 1919.

* * * * * * *

Comes now the plaintiff, by his attorney, and moves the Court for judgment for possession of the premises described in the above entitled cause, for want of a sufficient affidavit by the defendant.

WHARTON E. LESTER,
Attorney for Plaintiff.

Supreme Court of the District of Columbia.

Monday, March 17, 1919.

Session resumed pursuant to adjournment, Mr. Justice Gould presiding.

* * * * * * *

Upon consideration of the demand of defendant filed herein, for a trial of this cause by a jury, it is ordered that said demand be, and the same hereby is overruled. Defendant's Attorney thereupon prays an exception which is here noted.

* * * * * * *

14 Come now the parties hereto by their respective Attorneys of record; whereupon plaintiff's motion for judgment for want of a sufficient affidavit of defense under Law Rule 19 of this Court is argued and submitted. Upon consideration thereof it is ordered that said motion be, and the same hereby is granted. Whereupon it is considered that the plaintiff herein do have and recover of defendant herein possession of the premises No. 1505 Twenty second (22d) Street, Northwest, located in the District of Columbia, and the costs of suit, to be taxed by the Clerk, and have execution thereof.

The defendant by her Attorney in open Court, notes an appeal to the Court of Appeals of the District of Columbia and the penalty of the bond on said appeal to operate as a supersedeas is hereby fixed in the sum of One thousand dollars ($1,000.00).

Memorandum.

March 17, 1919.—Supersedeas Bond $1,000 approved and filed.

Assignment of Errors.

Filed April 17, 1919.

* * * * * * *

The Court erred:

1. In holding that the plaintiff was entitled to maintain the special proceedings of Landlord, and Tenant instituted originally in the Municipal Court.

2. In holding that the tenancy of the defendant was terminated by the notice to quit, a copy of which notice to quit is set forth in the record.

3. In not sustaining the objection of the defendant that said Rule 19, of the Supreme Court of the District of Columbia was and is unconstitutional and void.

4. In not sustaining the objection of the defendant that said Rule 19, was and is void under the law, namely, under the provisions of the Code, D. C., referred to in the affidavits of the defendant, filed in the suit.

5. In not sustaining the objection of the defendant, namely, that even if the Supreme Court had authority to pass said Rule 19, yet it is not applicable to the facts in the present case, not being an action ex contractu.

6. In not dismissing the proceedings on the motions of the defendant set up in her two affidavits filed in the suit.

7. In awarding judgment for the plaintiff upon the affidavit of the plaintiff.

15 8. In depriving the defendant of a trial by jury she having made demand for trial by jury.

9. In holding the Saulsbury Resolution unconstitutional and void.

CHAPIN BROWN,
Attorney for Defendant (Appellant).

Designation of Record.

Filed April 17, 1919.

* * * * * * *

The Clerk will include in the record on appeal to the Court of Appeals of the District of Columbia:

All of the papers on file in the case in the Clerk's office and all of the orders and the judgment of the Court of record, omitting only those portions of the transcript of record as are excluded under the provisions of Rule V of said Court of Appeals.

CHAPIN BROWN,
Attorney for the Defendant and Appellant.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 20, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 62067 at Law, wherein Sylvanus Stokes is Plaintiff and Anna Heitmuller is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 25th day of April, 1919.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG,
Clerk,
By F. E. CUNNINGHAM,
Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 3273. Anna Heitmuller, appellant, vs. Sylvanus Stokes. Court of Appeals, District of Columbia. Filed May 2, 1919. Henry W. Hodges, clerk.

16 Tuesday, December 2nd, A. D. 1919.

No. 3273.

ANNA HEITMULLER, Appellant,

vs.

SYLVANUS STOKES.

The argument in the above entitled cause was commenced by Mr. Chapin Brown, attorney for the appellant, and was concluded by Mr. W. E. Lester, attorney for the appellee.

17 Court of Appeals of the District of Columbia.

No. 3273.

ANNA HEITMULLER, Appellant,

v.

SYLVANUS STOKES, Appellee.

Opinion.

Mr. Justice ROBB delivered the opinion of the Court:

Appeal from a judgment in the Supreme Court of the District for the plaintiff, appellee here, under Law Rule 19 of that court in a landlord and tenant proceeding instituted in the Municipal Court.

Appellant challenges Law Rule 19 and relies upon the Saulsbury Resolution (40 Stat., 593). Rule 19 was sustained in Borden v. Carter, decided by this court on November 3, 1919 (47 Wash. Law Rep., 749), while the Saulsbury Resolution was declared unconstitutional in Wilson v. McDonnell, decided December 1, 1919.

Counsel for appellant suggests that the decision in United States v. Lynah, 188 U. S., 455, may have some bearing upon the constitutional question. In that case it was ruled that "when the Government appropriates property which it does not claim as its own it does so under an implied contract that it will pay the value of the property it so appropriates." But it was not ruled that a statute would be constitutional that authorized the taking of private property for public use without any provision for compensation. In Chicago Burlington, etc., R. R. v. Chicago, 166 U. S., 226, 236, the court said: "The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation." However, we need not pursue the question, for under the Saulsbury Resolution, as we already have indicated, one individual (the landlord) was deprived of his property for the benefit of another individual (the tenant), so that there has been no taking of private

property for public use within the meaning of the Constitution. It necessarily results that there is no such implied contract on the part of the United States as appellant here invokes.

The judgment is affirmed with costs.

Affirmed.

18 January Term, 1920.

No. 3273.

ANNA HEITMULLER, Appellant,

vs.

SYLVANUS STOKES.

Appeal from the Supreme Court of the District of Columbia.

Monday, January 5th, A. D. 1920.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

PER MR. JUSTICE ROBB.

January 5, 1920.

19 In the Court of Appeals of the District of Columbia, October Term, 1919.

No. 3273.

ANNA HEITMULLER, Appellant,

vs.

SYLVANUS STOKES, Appellee.

Please take notice that the appellant, Anna Heitmuller, will, by way of an appeal from the judgment against her of the Court of Appeals of the District of Columbia, pray a writ of error to the Supreme Court of the United States and that she will, on Thursday, January 15, 1920, at ten o'clock A. M. or as soon as counsel can be heard, ask the said Court of Appeals to fix the amount of her bond to act as a supersedeas.

CHAPIN BROWN,
CHAPIN B. BAUMAN,
Attorneys for Appellant, Anna Heitmuller.

To Whorton E. Lester, Attorney for Sylvanus Stokes, Appellee, Columbian Building.

Service of above notice acknowledged this 12th day of January, 1920.

WHARTON E. LESTER,
Attorney for Appellee.

Endorsed: No. 3273. Anna Heitmuller, Appellant, v. Sylvanus Stokes. Notice of intention to apply for writ of error and supersedeas. Court of Appeals, District of Columbia. Filed Jan. 14, 1920. Henry W. Hodges, Clerk.

20 No. 3273.

ANNA HEITMULLER, Appellant,

vs.

SYLVANUS STOKES.

Thursday, January 15th, A. D. 1920.

On motion of Mr. Chapin Brown, attorney for the appellant, it is ordered by the Court that a writ of error to remove the above entitled cause to the Supreme Court of the United States issue; and the bond to act as supersedeas is fixed at the sum of Two thousand dollars.

21 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Anna Heitmuller, appellant, and Sylvanus Stokes, appellee, a manifest error hath happened, to the great damage of the said appellant as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 15th day of January, in the year of our Lord one thousand nine hundred and twenty.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———.

22 In the Court of Appeals, District of Columbia, October Term, 1919.

No. 3273.

ANNA HEITMULLER, Appellant,

vs.

SYLVANUS STOKES.

Comes now the appellee, and making known to the Court the fact that he has sold and conveyed the real estate, the subject matter of the above entitled cause, says that he has no further interest in said cause except to recover costs, and the rental due him because of the wrongful detention of said property, and therefore prays that the writ of error granted herein, be dismissed upon the authority of Cardoza vs. Baird, 30 App. 86, and Wingert vs. Hagerstown First National Bank 223 U. S. 670. He further says that no appeal bond has been given herein by appellant.

WHARTON E. LESTER,
Attorney for Appellee.

Endorsed: In the Court of Appeals, District of Columbia, October Term, 1919. No. 3273. Anna Heitmuller, Appellant, vs. Sylvanus Stokes. Motion to Dismiss Writ of Error. Court of Appeals, District of Columbia. Filed Feb. 9, 1920. Henry W. Hodges, Clerk.

23 No. 3273.

ANNA HEITMULLER, Appellant,

vs.

SYLVANUS STOKES.

Saturday, February 14th, A. D. 1920.

On consideration of the motion to dismiss the writ of error in the above entitled cause, It is by the Court this day ordered that said motion be and the same is hereby denied.

24 No. 3273.

ANNA HEITMULLER, Appellant,

vs.

SYLVANUS STOKES.

Saturday, February 14th, A. D. 1920.

It is ordered by the Court that the mandate in the above entitled cause issue unless supersedeas bond on writ of error be filed within five days.

25 (*Bond on Writ of Error.*)

Know all men by these presents, That we, Anna Heitmuller, as principal, and Ernst Gerstenberg and Jesse E. Heitmuller, as sureties, are held and firmly bound unto Sylvanus Stokes in the full and just sum of Two Thousand Dollars ($2,000.00) to be paid to the said Sylvanus Stokes, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to *to* be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this — day of February, in the year of our Lord one thousand nine hundred and twenty.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between the said Anna Heitmuller, Appellant and the said Sylvanus Stokes, Appellee, No. 3273 a judgment was rendered against the said Anna Heitmuller and the said Anna Heitmuller having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Sylvanus Stokes citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Anna Heitmuller shall prosecute said writ of error to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

ANNA HEITMULLER. [SEAL.]
ERNST GERSTENBERG. [SEAL.]
JESSE E. HEITMULLER. [SEAL.]

Witness as to all signatures:
CHAPIN BROWN,
600 F Street N. W., Washington, D. C.

Approved by—
CONSTANTINE J. SMYTH,
Chief Justice Court of Appeals
of the District of Columbia.

[On margin:] Surety sufficient:
W. E. LESTER.

[Endorsed:] No. 3273. Anna Heitmuller, Appellant, vs. Sylvanus Stokes. Supersedeas bond on writ of error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Feb. 17, 1920. Henry W. Hodges, Clerk.

26 UNITED STATES OF AMERICA, *ss:*

To Sylvanus Stokes, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Anna Heitmuller is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Constantine J. Smyth, Chief Justice of the Court of Appeals of the District of Columbia, this 17th day of February, in the year of our Lord one thousand nine hundred and twenty.

CONSTANTINE J. SMYTH,
Chief Justice of the Court of Appeals
of the District of Columbia.

Service acknowledged Feb. 17th, 1920.
WHARTON E. LESTER,
Counsel for Sylvanus Stokes.

[Stamped:] Court of Appeals, District of Columbia. Filed Feb. 17, 1920. Henry W. Hodges, Clerk.

27 In the Court of Appeals of the District of Columbia, October Term, 1919.

No. 3273.

ANNA HEITMULLER, Appellant,

vs.

SYLVANUS STOKES, Appellee.

Assignment of Errors.

The Court erred:

1. In holding as unconstitutional the public resolution of the Congress entitled "Joint resolution to prevent profiteering in the District of Columbia," approved May 31, 1918.

2. In not sustaining the objection of the defendant that said Rule 19, of the Supreme Court of the District of Columbia, was and is unconstitutional and void.

3. In not sustaining the objection of the defendant that said Rule 19 was — is void under the law; namely, under the provisions of the Code, D. C., referred to in the affidavits of the defendant, filed in the suit.

4. In not sustaining the objection of the defendant, namely, that even if the Supreme Court had authority to pass said Rule 19, yet it is not applicable to the facts in the present case, not being an action ex contractu.

5. In not dismissing the proceedings on the motions of the defendant set up in her two affidavits filed in the suit.

6. In not setting aside the judgment for the plaintiff (appellee) awarded by the Supreme Court of the District of Columbia upon the affidavit of the plaintiff (appel-ee).

7. In depriving the defendant of a trial by jury, she having made demand for trial by jury.

8. In not holding that the plaintiff (appellee) was not en-
28 titled to maintain the special proceedings of landlord and tenant, instituted originally in the Municipal Court.

9. In not holding that the tenancy of the defendant was not terminated by the notice to quit, a copy of which notice to quit is set forth in the record.

CHAPIN BROWN,
CHAPIN B. BAUMAN,
Attorneys for Appellant.

Endorsed: No. 3273. Anna Heitmuller, Appellant, vs. Sylvanus Stokes. Appellant's Assignment of Errors. Court of Appeals, District of Columbia. Filed March 15, 1920. Henry W. Hodges, Clerk.

29 Court of Appeals of the District of Columbia.

No. 3273.

ANNA HEITMULLER, Appellant,

vs.

SYLVANUS STOKES.

Order of Appellant as to Preparation of Record on Appeal.

To the Clerk of — Appeals of the District of Columbia:

The Clerk of the Court of Appeals of the District of Columbia, will include in the record on appeal, all of the papers on file in the said Court of Appeals, on which the above entitled case was heard in said Court of Appeals, and also all papers filed subsequent to said hearing, namely, the final decree and judgment and opinion of said Court of Appeals, bond on appeal, and this order as to the preparation of the record appeal.

CHAPIN BROWN,
CHAPIN B. BAUMAN,
Attorneys for Appellant.

Endorsed: No. 3273. Anna Heitmuller, Appellant, vs. Sylvanus Stokes. Order as to preparation of record on appeal. Court of Appeals, District of Columbia. Filed March 16, 1920. Henry W. Hodges, Clerk.

30 Court of Appeals of the District of Columbia.

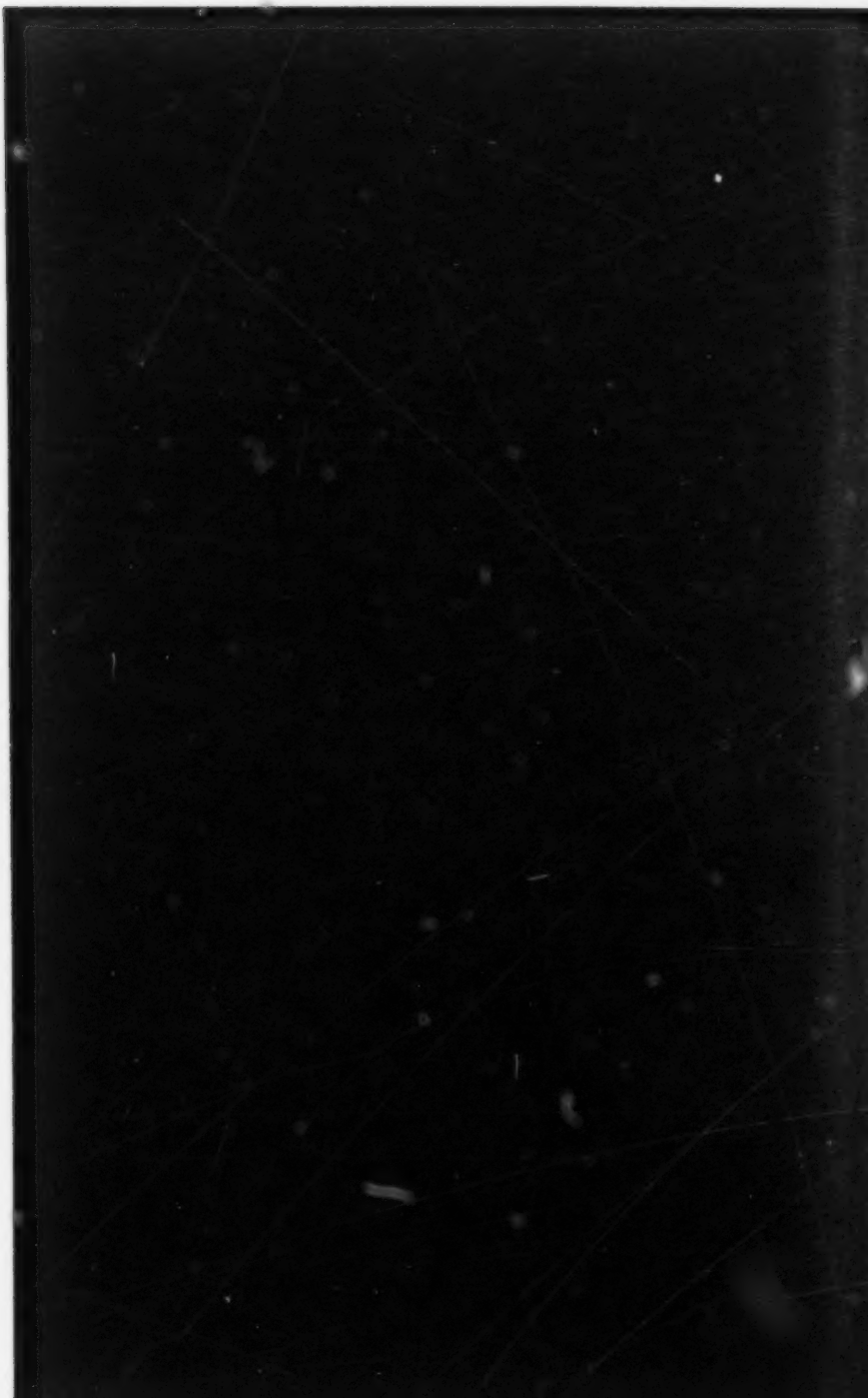
I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 29 inclusive constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Anna Heitmuller, Appellant, vs. Sylvanus Stokes, No. 3273, January Term, 1920, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 16th day of March, A. D. 1920.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

Endorsed on cover: File No. 27,556. District of Columbia Court of Appeals. Term No. 279. Anna Heitmuller, plaintiff in error, vs. Sylvanus Stokes. Filed March 17th, 1920. File No. 27,556.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 279.

ANNA HEITMULLER, PLAINTIFF IN ERROR,

vs.

SYLVANUS STOKES.

MOTION TO DISMISS WRIT OF ERROR.

Comes now the appellee, by his attorney, and moves the court to dismiss the writ of error granted herein, and for cause says:

1. The cause of action between the parties hereto has ceased to exist, for that after the judgment of the Court of Appeals of the District of Columbia, appellee sold and conveyed the real estate, the subject-matter of this suit, and therefore is not now entitled to the relief herein sought, namely, the possession of said premises.

2. There is now no actual controversy involving real and substantial rights between the parties to the record, and no subject-matter upon which the judgment of this court can operate.

3. The only question now involved in this appeal, is that of costs.

WHARTON E. LESTER,
Attorney for Appellee.

CHAPIN BROWN, *Esquire,*
Attorney for Appellant:

Please take notice that the above motion will be submitted to the court on Monday, October 4, 1920.

WHARTON E. LESTER,
Attorney for Appellee.

Copy of above motion received this 8th day of July, 1920.

CHAPIN BROWN,
Attorney for Appellant.

Memorandum in Support of the Foregoing Motion.

This case originated in the Municipal Court of the District of Columbia, where appellee sought to recover possession of a dwelling house, which had been duly conveyed to him, and which was then occupied by appellant as a monthly tenant, under a written agreement which had been assigned to appellee. Appellant had been notified to quit. The case was appealed to the Supreme Court of the District of Columbia, which entered a judgment for possession in favor of the appellee under the provisions of its rule numbered 19, which provided that if the plaintiff should file an affidavit setting out the grounds upon which he claimed possession of the premises, judgment should be entered for him unless the defendant should file an affidavit of defense, stating the

grounds of his defense, which must be such as would, if true, be sufficient to defeat plaintiff's recovery. Appellant appealed to the Court of Appeals of the District of Columbia where the judgment was affirmed.

After opinion rendered, appellee moved the Court of Appeals to dismiss the writ of error because he had then sold the property, the subject-matter of the suit, leaving the only question involved, that of costs. The writ had then been allowed and the motion was denied (Rec., p. 19).

Having sold the property, appellee is not now entitled to possession thereof. He is entitled to nothing except costs and an inquiry under the appeal bond as to the amount he shall hereafter be awarded for use and occupation of the premises and for intervening damages for the retention thereof. Pending this appeal, an event has therefore occurred which renders it impossible for this court to grant relief in this case, which is now merely a moot one.

It is submitted that being now a moot case, the appeal should be dismissed.

In Mills *vs.* Green, 159 U. S., 651, suit was filed for an injunction restraining the supervisor of a county in South Carolina from doing certain acts which the plaintiff thought would deprive him of the right to vote at the coming election. Pending the appeal the election was held. The appeal was dismissed. The court said:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it,"

and cited numerous cases where this court had dismissed appeals because, for one reason or another, the relief originally sought could not then be granted.

In California *vs.* San Pablo and Tulare R. Co., 149 U. S., 307, it was held:

> "Where the cause of action between the parties to a writ of error pending in this court, has ceased to exist, the writ of error must be dismissed."

In Wingert *vs.* First National Bank, 223 U. S., 670, the suit was to enjoin a bank from erecting a building. Before the case could be heard in this court the building was completed. The appeal was dismissed because the only ground for further prosecution of the case was to recover costs.

In Richardson *vs.* McChesney, 218 U. S., 487, the appeal was dismissed for want of jurisdiction. The case was brought to this court to review a decree refusing to require a State official to certify names of nominees for Congress to clerks of various county courts. While the suit was pending, the elections were held and the question involved was a moot question only.

In the Paper-Bag Machine cases, 105 U. S., 766, the court held that where, on an appeal, the controversy is really as to costs alone, the appeal will not be considered.

See also Glendale Elastic Fabric Co. *vs.* Smith, 100 U. S., 43.

A writ of error was allowed in this case because the constitutionality of the so-called "Saulsbury Resolution," relating to rents in the District of Columbia, was held to be involved. That act has been invalidated by a subsequent act of Congress ("The Ball Rent Act," approved October 22, 1919).

Respectfully submitted.

WHARTON E. LESTER.
Attorney for Appellee.

Office Supreme Court, U. S.
FILED
MAR 21 1921
JAMES D. MAHER,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 279.

ANNA HEITMULLER, PLAINTIFF IN ERROR,

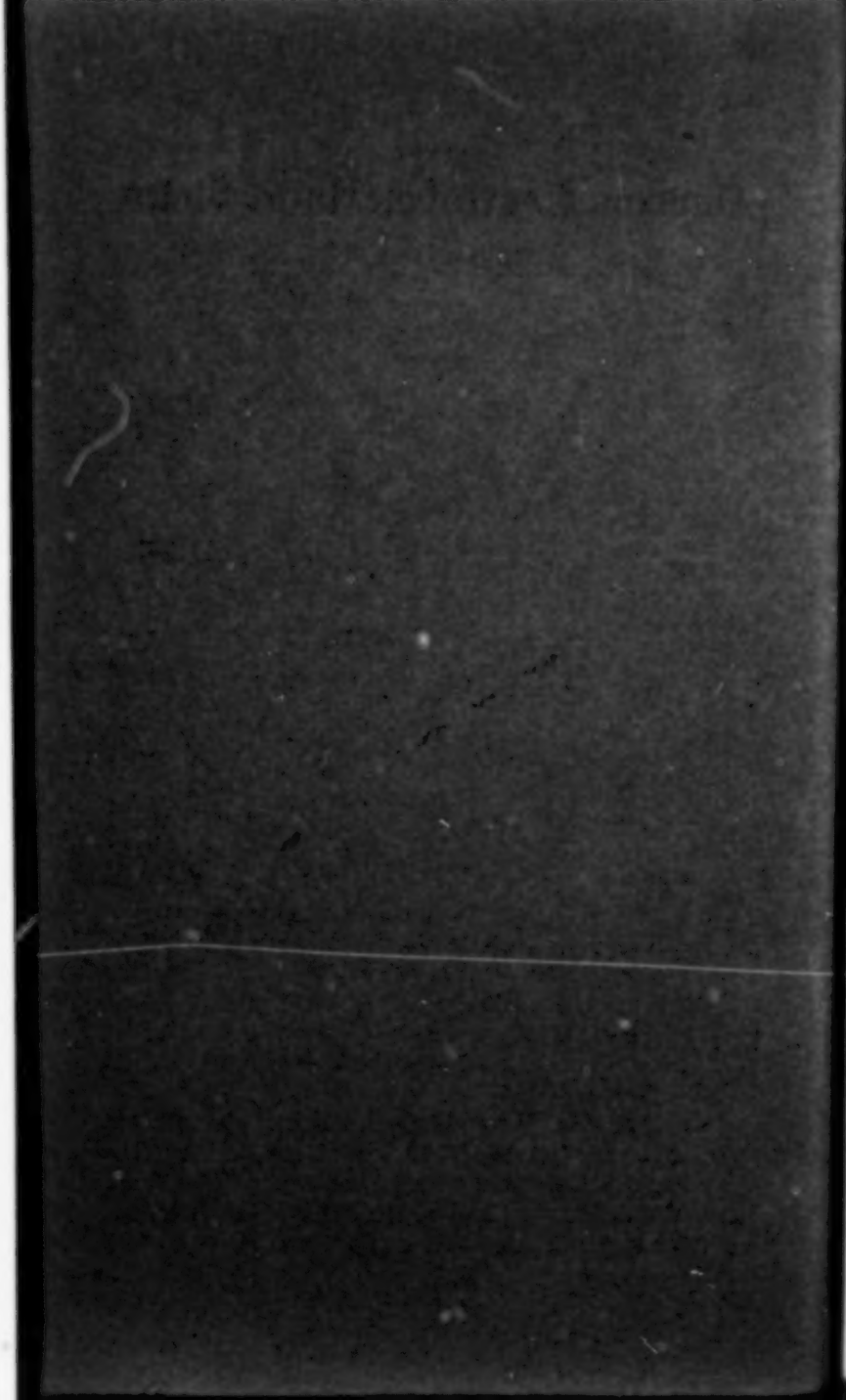
vs.

SYLVANUS STOKES.

Brief on Behalf of Plaintiff in Error.

CHAPIN BROWN,
C. B. BAUMAN,
Attorneys for Plaintiff in Error.

THE LAW REPORTER PRINTING COMPANY, WASHINGTON, D. C.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 279.

ANNA HEITMULLER, PLAINTIFF IN ERROR,

vs.

SYLVANUS STOKES.

Brief on Behalf of Plaintiff in Error.

Statement of Facts.

This is a suit instituted originally in the Municipal Court by the appellee (plaintiff below), claiming to be a purchaser of premises, against the plaintiff in error (defendant below), the tenant of those premises. After trial in the Municipal Court, judgment was rendered for the plaintiff in error (defendant below). The defendant in error (plaintiff below) appealed to the Supreme Court of the District of Columbia (Rec., p. 3), and under Rule 19 of that court, filed his affidavit alleging that he was a bona fide purchaser of said premises which he bought for the occupancy of himself and family. That the plaintiff in error (defendant) was then occupying, and had occupied the premises since September, 1912, under an agreement between her and The Washington Loan and Trust Company.

The defendant in error (plaintiff below) claimed that the said rent agreement had been assigned by The Washington Loan and Trust Company to New York Real Estate Brokers, and by the latter to the defendant in error (plaintiff below) (Rec., pp. 6 and 7).

The plaintiff in error (defendant) by way of defense, demanded a trial by jury under the provisions of the following sections of the Code, D. C., namely: sections 32, 80 and 1232, and upon the further ground of the Constitutional right under the fifth and seventh amendments, and other provisions of the Constitution therein mentioned (Rec., p. 8) and upon the further ground that said Rule 19, was intended to apply only to actions ex contractu, and that this was an action ex delicto; and upon the further ground that the Supreme Court of the District of Columbia had no legal power or right to make such a rule as Rule 19, applicable to actions ex delicto.

The plaintiff in error—reserving, and without waiving her demand for trial by jury—filed her affidavit of defense under said Rule 19, setting up nine separate grounds of defense, all of which are relied upon in this court on appeal. The plaintiff in error (defendant) not only denies in her affidavit of defense the right of the defendant in error (plaintiff below) to the possession of the property in question, but she sets forth her grounds of defense, consisting of facts which (the plaintiff in error claimed) if submitted to a jury would be sufficient, on the merits of the controversy, for the jury to find that the defendant in error (plaintiff below) was not "a bona fide purchaser for his own occupancy," and thus find for the plaintiff in error (defendant below).

But upon the affidavits the court below reversed the judgment of the Municipal Court (which was for the plaintiff in error) and rendered judgment for the defendant in error (plaintiff below); from which judgment the plaintiff in error (defendant below) appealed to the Court of Appeals of the District of Columbia, and that court having affirmed the judgment of the Supreme Court of the District of Columbia (49 App. D. C., 391; 266 Fed., 1011), the plaintiff in error (defendant below) was allowed writ of error to the Supreme Court of the United States.

Assignment of Errors.

(Rec., p. 22.)

The court erred:

1. In holding as unconstitutional the public resolution of the Congress entitled "Joint Resolution to Prevent Profiteering in the District of Columbia," approved May 31, 1918. (40 Stat. L. 593.)

2. In not sustaining the objection of the defendant that said Rule 19, of the Supreme Court of the District of Columbia, was and is unconstitutional and void.

3. In not sustaining the objection of the defendant that said Rule 19 was—is void under the law; namely, under the provisions of the Code, D. C., referred to in the affidavits of the defendant, filed in the suit.

4. In not sustaining the objection of the defendant, namely, that even if the Supreme Court had authority to pass said Rule 19, yet it is not applicable to the facts in the present case, not being an action *ex contractu*.

5. In not dismissing the proceedings on the motions of the defendant set up in her two affidavits filed in the suit.

6. In not setting aside the judgment for the plaintiff (appellee) awarded by the Supreme Court of the District of Columbia upon the affidavit of the plaintiff (appellee).

7. In depriving the defendant of a trial by jury, she having made demand for trial by jury.

8. In not holding that the plaintiff (appellee) was not entitled to maintain the special proceedings of landlord and tenant, instituted originally in the Municipal Court.

9. In not holding that the tenancy of the defendant was not terminated by the notice to quit, a copy of which notice to quit is set forth in the record.

ARGUMENT.

The first question raised by the Assignment of Error is whether or not the Act of Congress commonly called the "Saulsbury Joint Resolution" and entitled "Joint Resolution to Prevent Profiteering in the District of Columbia," approved May 31, 1918 (49 Statutes, 593) is constitutional.

This Act of Congress (Saulsbury Joint Resolution) had been before the Court of Appeals several times, but the constitutionality of it was not passed upon until the case of Willson *vs.* McDonnell, 49 App. D. C., 380 265 Fed., 432, decided December 1st, 1919. This was subsequent to the time for filing the briefs in the case at bar, and before the actual hearing of the case at bar by the Court of Appeals. The constitutionality of the Saulsbury Joint Resolution was not, therefore, argued at length in the Court of Appeals, although the plaintiff in error in no way waived her right to maintain the constitutionality of said Act of Congress (Saulsbury Joint Resolution) and she submitted orally, through her counsel, the constitutional question as to whether there was not an implied promise on the part of the United States contained in the Saulsbury Joint Resolution to pay the landlords for any loss that they might sustain by reason of the provisions of the said Saulsbury Resolution. The Act of Congress of March 3, 1887, ch. 359 24 Stat. L., 505, provides that the Court of Claims shall have jurisdiction to entertain any claim against the United States founded "upon any contract, express or implied, with the Government of the United States or for damages, liquidated or unliquidated, in cases not sounded in tort, in respect of which claims a party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States was suable." In the case of the United

States *vs.* Lynch, 188 United States, 455, 23 Sup. Ct., 349, 49 L. Ed., 539, it was held by this court:

> ' When the Government appropriates property, which it does not claim as its own, it does so under an implied contract that it will pay the value of the property that it so appropriated."

It is respectfully submitted that in passing the Saulsbury Resolution with the Statute of March 3, 1887, in force, t was the same as if the provision, above quoted, of the Statute of March 3, 1887, had been incorporated in the latter Statute (Saulsbury Resolution).

Soper *vs.* Myers, 45 App. D. C., 286.

In the next above cited case, it was held by the court that a lease made for one year with the privi ege of another year, was a lease only for one year, Section 1034 of the Code, D. C. provided that such a lease should be only a lease for one year and the court he'd that the lease was made in reference to the law, and it was the same as if said Section 1034 had been incorporated in the lease. The same principle of construction is applicable to a statute passed subject to the law as created by a previous statute, unless it be made to appear in the latter statute that the previous law is repealed or made nappl cable to the latter statute.

It is, therefore, respectfully submitted that the owners or landlords of property, if they were deprived of any property in rents by the Saulsbury Resolution, have their remedy in the Court of Claims under the Act of March 3, 1887; and that, therefore, the Saulsbury Resolution can not be held to be unconstitutional as depriving them of their property without just compensation or without due process of law.

The war powers under the Constitution and the police powers of the Government have been so well presented to the court in the case recently argued by

learned counsel, bearing upon the Ball Amendment, that it is unnecessary to reproduce any further authorities in this brief.

It is respectfully submitted that the Saulsbury Resolution is constitutional and that the judgment of the Court of Appeals in the case at bar should be reversed upon this ground.

Second. The defendant in error, Sylvanus Stokes, hereinafter called plaintiff, had no right to maintain a landlord and tenant proceedings against Anna Heitmuller, the plaintiff in error, hereinafter called defendant, in the Municipal Court of the District of Columbia. The plaintiff's remedy is either by a suit in ejectment or by a bill in equity if he be remediless at law. This defendant does not attempt to determine in advance the proper remedy, and reserves the right to present the law and the facts to any court where any remedy, whatever, is attempted to be pursued, for the purpose of having that court advised as to the law as far as the defendant's counsel is able to so advise. It is not attempted here to assert or be bound by any assertion that the plaintiff's remedy is either in law or in equity, but in a very analogous case to the one at bar the Supreme Court conclusively decided that the plaintiff's remedy was not summary landlord and tenant proceedings in the court of a justice of the peace, now by statute enlarged to the Municipal Court. I refer to the case of Willis (appellant) *vs.* Eastern Trust & Banking Company, 169 U. S., 303, 42 L. Ed., 754.

This next above cited case reversed the decision of the Court of Appeals of the District of Columbia in the (same) case of Eastern Trust & Banking Co. (appellant) *vs.* Willis, 6 App. D. C., 376.

The U. S. Supreme Court cited with approval the decision of the Supreme Court of the District of Columbia in the case of Jennings *vs.* Webb, 20 D. C., 317.

The U. S. Supreme Court in the above cited case of Willis *vs.* Trust Co., at page 310 (L. Ed., 759), speaking through Mr. Justice Gray, say:

> ". . . in order to sustain this form of proceeding (landlord and tenant), the conventional relation of landlord and tenant must exist, or have existed between the parties."

And again in the same case, at a previous page (305 L. Ed. 756), Mr. Justice Gray quotes with approval from the case (above) of Jennings *vs.* Webb, 20 D. C., 317, as follows:

> "'In this proceeding, unless he (plaintiff), establishes the relation of landlord between himself and the defendant, no matter what the form of the declaration is, he is not entitled to recover.'"

Further on at page 311 (L. Ed., pages 759 and 760) Mr. Justice Gray says:

> "The result is, that the plaintiff is not entitled to maintain this process, but must be left, so far as the aid of a court of justice is requisite to secure the rights conferred by the mortgage, to the appropriate remedy of a writ of ejectment or a bill of foreclosure. Comp. Stat. D. C., Chap. 48, sec. 1; Chap. 55, sec. 10, Hogan *vs.* Kurtz, 94 U. S., 773, 24 L. Ed., 317; Hughes *vs.* Edwards, 22 U. S., 9 Wheat., 489, 6 L. Ed., 142."

Of course the decision of the U. S. Supreme Court (in Willis *vs.* Trust Co.) declares and settles the law for this District, regardless of the decisions of other courts; but the decisions of other courts are to the same effect. The following may be mentioned among others:

Ray *vs.* Cotter, 29 Cal., 168.
Martel *vs.* Meehan, 63 Cal., 47.
Allen *vs.* Smith, 7 Halstead, 228.
Youngs *vs.* Freeman, 3 Green, Law N. J., 30.
Holland *vs.* Reed, 11 Mo., 606.

Picet *vs.* Masterson, 12 Mo., 303.
Devine *vs.* Brown, 35 Ala., 596.
Cummings *vs.* Kilpatrick, 23 Miss., 106.
Harrison *vs.* Middleton, 11 Gratt. (Va.), 527.
Cooper *vs.* Gambil, 146 Ala., 184.
Hadley *vs.* Havens, 24 Vt., 520.
Wheeler *vs.* Wheeler, 77 Vt., 208.
McMillin *vs.* McCreary, 54 Pa. St., 230.
Goodman *vs.* Latimer, 26 S. C., 208.

The law passed upon by the U. S. Supreme Court was the Act of Congress of July 4, 1864, sections 680 to 691, Revised Statutes of the District of Columbia, and the language of that act, and these sections, is practically the same as the sections of the Code, D. C. (1218-1236), under the head of "Landlord and Tenant."

After the decision in the Willis *vs.* Trust Co. case the old law was amended by Congress, so as to make the purchaser of real estate *under a deed of trust or mortgage or execution (fieri facias)* the landlord of the tenant where his tenancy began subsequent to the execution of the deed of trust or mortgage; but the law was changed *only* to this extent, and was not changed so as to cover a case like the one at bar.

The amendment of the law is embraced in section 1036 of the Code, D. C., and the change is in the *proviso* of that section. The section (1036) reads as follows:

> "*Estates at Will.*—An estate at will is one held by the joint will of a lessor and lessee, and which may be terminated at any time, as herein otherwise provided, by either party; and such estate shall not exist or be created except by express contract. Provided, however, that in case of a sale of real estate *under mortgage or deed of trust or execution, and a conveyance thereof to the purchaser*, the grantor in such mortgage or deed of trust, *execution defendant*, or *those in possession claiming under him*, shall be held and construed

to be tenants at will, except in the case of a tenant holding under an unexpired lease for years, in writing, antedating the mortgage or deed of trust."

See, also, section 20 Code, D. C., using same language, hereinafter set forth at page 11 of this brief.

It has been suggested, however, that the plaintiff was the "assignee of reversion" under section 1234 of the Code, D. C.; but this is impossible, as the tenant (defendant herein) only held by a monthly tenancy agreement, and under any agreement *not under seal*, and section 1234, for "Assignee of Reversion" refers to and relates solely to leased premises, by a *grant*, or by *devised* estate, and does not refer or relate to an estate created by an agreement for monthly tenancy. *The agreement of the Washington Loan and Trust Company is not under its seal.* This proposition is plain (first) from a reading of section 1234 itself, which is taken from the statute of 32 Henry 8, 34, sec. 1, 2, and relates to leases under seal only (Sheets *vs.* Selden, 2 Wall., 69, U. S., 177, at 190; 17 L. Ed., 822, at 826); and it is also plain (second) that it (section 1234) relates to leases under *seal* or a *devise* only, when it speaks of "assignee of reversion," from the definition of that estate (reversion) in section 1019 of the Code, D. C. The language of the two sections are as follows:

"Sec. 1019. *Reversions.*—A reversion is the residue of an estate left in the *grantor who has conveyed*, or in the heirs of the devisor who has *devised* a particular estate less than his own, and which residue returns to his or their possession on the expiration of the particular estate.

"Sec. 1234. *Assignee of Reversion.*—The grantee or assignee of the reversion of any leased premises shall have the same right of action against the lessee, or his personal representatives, heirs, or assigns, for rent or for any forfeiture or breach of any covenant or condition in the lease which

> the grantor or assignor might have had; and the assignee of the lessee shall have the same rights of action against the lessor, his grantee, or assignee upon any covenants in the lease which the lessee might have had against the lessor."

The U. S. Supreme Court in construing the language in the statute of 32 Henry 8, the same as in section 1234 (above quoted) in the above cited case of Sheets *vs.* Seldon, 2 Wall., 69 U. S., 177, 17 L. Ed., 822 (at p. 190, L. Ed., p. 826), say:

> "It is conceded that at the common law the grantee of a reversion could not enter or bring ejectment for breach of the covenants of a lease; and that the statute of 32 Henry 8, giving the right of entry and of action to such grantee, was confined to leases under seal. The statute speaks of conditions, covenants and agreements, contained in indentures of leases, demises and grants, language only applicable to sealed instruments. That statute was adopted in Indiana as early as 1818, but a law of the state passed in 1843, alters its rule, and extends its remedies to all leases."

It seems conclusive, therefore, that the purchaser of real property, occupied by a tenant under a tenancy by sufferance or a monthly tenancy from, and as a tenant of, the former owner, is in the same position in reference to the tenant, as was (*formerly*) the purchaser of real estate under a deed of trust or mortgage sale, or under an execution sale; and that until the purchaser (new owner) establishes the relation of landlord to the tenant, he (the new owner) has no right whatever to avail himself of the landlord and tenant proceedings.

It was suggested in argument that the defect in the law as it formerly existed had been remedied by statute or in the Code, as hereinbefore set forth. But the remedy by amendment as above shown, related solely to a pur-

chaser of property under, through and by a deed of trust or mortgage, and is embodied in sections 1036 of the Code and section 20 of the Code. Section 1036 of the Code only gave to a purchaser of real estate under a mortgage or deed of trust or under an execution of the court as the substituted landlord of the tenant the right to avail himself of the landlord and tenant proceedings provided for in section 20 of the Code. This is plain from a reading of section 1036 of the Code, which is as supra.

Section 20 of the Code provides as follows:

> "*Forcible Entry and Detainer.* Whenever any persons shall forcibly enter and detain any building or inclosed real property, or shall unlawfully, but without force, enter and unlawfully and forcibly detain the same, or whenever any tenant shall unlawfully detain possession of the property leased to him, after his tenancy therein has expired, or any mortgagor or grantor in a mortgage or deed of trust to secure a debt, shall unlawfully detain the possession of the real property conveyed, after a sale thereof under such deed of trust or a foreclosure of the mortgage, or any person claiming under such mortgagor or grantor, after the date of the mortgage or deed of trust, shall so detain the same, or a judgment debtor or any persons claiming under him, since the date of the judgment shall so detain possession of real property, after a sale thereof under an execution issued on such judgment, it shall be lawful for any justice of the peace, on complaint under oath by the person aggrieved by said unlawful detention, to issue a summons to the party complained of to appear and show cause why judgment should not be given against him for the restitution of the possession."

Prior to the decision of the Supreme Court of the United States purchasers under deeds of trust, sales, and execution sales under the court, were permitted erron-

eously by the Supreme Court of the District of Columbia and also the Court of Appeals to bring these landlord and tenant proceedings, the times then being normal and nobody being interested enough to test the question. Of course, in normal times, it is not likely that the question of law set forth in this brief, would arise, because the tenant would probably, under ordinary circumstances, attorn to a new owner, and the new owner would have no reason not to receive the rent, and the relation of landlord and tenant having thereby been established, the landlord and tenant proceeding would be available as a remedy. But in these abnormal times if the new owner accepts rent, he clearly becomes the landlord, and has no right to possession unless he is "in the employ of, or officially connected with a (any) branch of the Government," as provided in the Saulsbury Resolution. And we thus have the plaintiff in the dual and inconsistent position of first claiming not to be landlord of the tenant, so as to avoid the necessity of being in the Government service, and second of claiming to be the landlord for the purpose of suing—by a short cut—for possession; because the suit under this particular and special "summary" proceeding must be instituted by a *landlord* of the tenant under the authority solely of section 1225 of the Code, D. C., which is as follows:

> "Ejectment or Summary Proceedings.—Whenever a lease for any definite term shall expire, or *any tenancy shall be terminated* by notice as aforesaid, and the tenant shall fail or refuse to surrender possession of the leased premises, the *landlord* may bring an action of ejectment to recover possession in the Supreme Court of the District; or the *landlord* may bring an action to recover possession before a justice of the peace, as provided in chapter one, subchapter one, aforesaid."

The form and the requirements of a notice to quit are given below on page 14.

It having thus been conclusively shown that there is no provision of law which authorizes the plaintiff to sue the defendant under these summary proceedings, either as the law originally existed; or under any amendatory, supplementary or enabling acts (making certain persons stand in the place of, or as substituted landlords), it is respectfully submitted that the proceedings should be dismissed, and judgment rendered for defendant for costs.

Nor is there any provision in the Saulsbury Resolution which enables or authorizes the plaintiff to sue under this summary proceeding. The Saulsbury Resolution left the parties free to avail themselves of any proceeding—either at law or in equity—which is applicable to their case. The Municipal Court, or justice of the peace, where these summary proceedings have to be instituted is and are not referred to. The language of the Saulsbury Resolution mentions "all remedies at law and in equity of the lessor," and also mentions "judicial order, decree or judgment," implying both law and equity jurisdiction, as the case may be, and the remedy is applicable.

Note: Suggestion as to what is the proper court proceeding for the plaintiff to avail himself of is hereafter made in this brief.

Third. The second ground of defense to the plaintiff's claim for possession is (ninth assignment of errors): That the defendant's tenancy has never been terminated (by a proper and legal notice to quit). Most of what has been previously said in this brief under the first ground of defense, concerning the conventional relation of landlord and tenant, is applicable to, and supports this (second) ground of defense; and the notice to end the tenancy must under the law come *from the landlord*, and the plaintiff *must be* the landlord if he is to avail himself of these special summary pro-

ceedings. This (relation) the plaintiff in this case—both by his notice to quit and by his complaint—avoids becoming and assuming, and if he did become (landlord), then his complaint is fatally defective in not alleging further and showing that "he is in the employ of or officially connected with any branch of the Government" (Saulsbury Resolution).

The notice necessary to end a tenancy by the month is specified in section 1219 of the Code, D. C., and that section is as follows:

> "Notice to Quit. A tenancy from month to month, or from quarter to quarter, may be terminated by a thirty days' notice in writing *from the landlord* to the tenant to quit, said notice to expire, in either case, on the day of the month from which such tenancy commenced to run."

A notice from one having no such relation of landlord is of no avail.

Fourth. The third ground of defense to the plaintiff's claim for possession is (sixth and seventh assignments of error): That it is (at least) required by the law (Saulsbury Resolution) that the plaintiff allege (and this fact being disputed and denied by the defendant, it becomes a question of fact, to be proven) *that the said premises are necessarily required by him for his own occupancy*. For, however much new or recent purchasers (for their own occupation) may try to avoid the requirement of alleging and proving that "the premises are necessarily required," yet it is impossible to eliminate these words and this requirement, where a recent purchaser seeks to deprive a tenant of his right to the possession of his home.

In other words the Saulsbury Resolution plainly and unmistakably requires an *employee* of the Government—who is now necessarily a war worker—to allege and prove "that the premises are *necessarily* required" by him

(employee *of* the Government) "for occupation, etc." This being a plain provision and requirement of the law, when an employee of the Government is concerned, it is plain that Congress did not intend to, and did not, give to a naked purchaser who is not an employee *of* the Government—greater right and privilege than an employee of the Government and a "war worker" was given. Consequently it was uniformly held by the judges of the Municipal Court that the law (Saulsbury Resolution) provides and required that *any* purchaser must allege and prove "that the premises are necessarily required, etc." Any other interpretation or construction of the Saulsbury Resolution, it is respectfully submitted, came from a hurried and cursory reading of the Saulsbury Resolution, and from a misconception of the meaning of the adverb "where," preceding the words "the property has been sold to a bona fide purchaser for his own occupancy" (in the Saulsbury Resolution). It is impossible to construe this relative adverb "where" to mean the same as the preceding conjunction "unless," so as to make the sentence read "*or unless* the property has been sold to a bona fide purchaser for his own occupancy." This word "where" is used as a relative adverb and relates back to and refers to and qualifies and explains the previous words used in the Saulsbury Resolution, namely, "bona fide purchaser for occupation either by himself;" and in order properly to interpret the Saulsbury Resolution the words of the resolution, namely, "where the property has been sold to a bona fide purchaser for his own occupation," can be transposed so as to follow the previous words "bona fide purchaser for occupation either by himself," so that this part of the Saulsbury Resolution would then read:

> "Unless the tenant has committed waste, or (unless he) has been guilty on the premises *of* conduct which constitutes a nuisance or (*of*) a

> breach of the peace, or (of) other misdemeanor or crime, or that the premises are necessarily required by a landlord or (by) bona fide purchaser for occupation either by himself (*where the property has been sold to a bona fide purchaser for his own occupation*), or (by) his wife, (by his) children or (by his) dependents while he is in the employ of or officially connected with any branch of the Government."

The above interpretation of the part in question of the Saulsbury Act, gives effect and meaning of and to every word of that act, with the exception of the conjunction "*or*," which word is unnecessary if the qualifying words "where the property has been sold to a bona fide purchaser for his own occupation," are transposed so as to follow the other words of the Saulsbury Resolution, which they evidently refer to, and are evidently intended to qualify. But if those (next above quoted) words are to be placed or remain at the place in the Saulsbury Resolution where they appear in the act as passed—although referring to previous words of the act—then the conjunction "or" is necessary. To give any other interpretation than the above to the Saulsbury Resolution, would be in effect, and in fact, to repeal the requirement (necessarily required) imposed on an employee of the Government. This of course can not be done by language (subsequent) in the same act. The most that can be said of the subsequent language used is that it is a "proviso" or in the nature of a proviso, and provisos must be strictly construed, according to the universal rule in the construction of statutes.

It is hardly necessary to cite any cases authorizing the transposing or shifting of words or clauses or sentences of an act, in order to bring out more clearly the intention and meaning of the act; or authorizing the addition of words evidently omitted as understood or implied—such as done above by the words in parenthe-

sis—such as (unless he), (of), etc., or the omission of an unimportant word, such as the conjunction "or," when the transposition of a clause or sentence dispenses with its necessity. That is a well settled principle in the interpretation of laws. The case of Pollard *vs.* Bailey, 87 U. S., 520, 22 L. Ed., 376, adopts this rule of construction, where it is said:

> "The intention of the legislature when properly ascertained, must govern in the construction of every statute. For such purpose the whole statute must be examined. Single sentences and single provisions are not to be selected and construed by themselves, but the whole must be taken together."

See, also, in The Washington Law Reporter of November 15, 1918, Vol. 46, No. 46, at page 727, and particularly at page 728.

Sufficient facts were set up by appellant (defendant) in her affidavit of defense to entitle her to a jury trial; and the lower court erred in awarding judgment for the appellee (plaintiff).

Rule 19 has been sustained on account of its analogy or similarity to Rule 73. But Rule 73 has never been held to apply to any case except where the matters involved are *strictly ex contractu* (Deans *vs.* Echols, 2 App. D. C., 522, 528). The present case is not one involving matters ex contractu; there has never been any contractual relation between the plaintiff and defendant. It is more of the nature of an action *ex delicto*; a claim that appellant (defendant) was holding property without right. Construing the affidavit of the defendant liberally, as it must be construed even if it involved matters *ex contractu* (Codington *vs.* Standard Bank, 40 App. D. C., 409, 412, and cases cited), and the appellant should have been awarded a trial by jury.

Giving the narrowest interpretation to the Saulsbury Resolution, the plaintiff (appellee) would have to convince the jury that he purchased the property bona fide for "his own occupancy." Purchasing it for his wife, etc., is not enough; that comes under another part and provision of the Saulsbury Resolution. It is confidently submitted that the appellant (defendant) has set up in her affidavit facts which not only overcome the effect of the appellee's affidavit in this regard, but that if submitted to the jury, would justify a finding that appellee did not purchase for "his own occupancy." The facts set up in appellant's (defendant's) affidavit must be considered as true in applying the test (above cited cases under 73d rule). (Strauss *vs.* Hensey, 7 App. D. C., 289; Fidelity, etc., Co. *vs.* U. S., 187 U. S., 315, 47 L. Ed., 194.)

What are the facts in the case?

We ask the court to read them from the record (page 10), but the following are referred to:

That a man owning two apartment houses—containing 50 apartments—and building a third one—claims that he is unable to obtain, and has been unable to obtain for the past year, and more, any one of these apartments for himself and family. The proposition so asserted seems unreasonable, and is not sustained by the proof, because in fact he is now occupying one of these numerous apartments. And not being able, as he asserts, to obtain other accommodations, he purchases a house occupied by an army officer (Major Eugene M. Foster, U. S. A.), his wife and dependent mother-in-law, and invokes the court's aid in turning them out. Without going into detail as to the facts, it is respectfully submitted, that the Saulsbury Resolution was intended to, and does prevent, just such attempted evictions. We ask a careful reading by the court of appellant's second ground of defense appearing

on page 10 of the record, bearing upon the merits of the case, and controverted facts, where further facts are set forth.

Suggested Remedy.

As to the proper remedy for the plaintiff to pursue, attention is (first) called to the language of the U. S. Supreme Court in the above cited case of Willis *vs.* Eastern Trust and Banking Co., 169 U. S., 303, where Mr. Justice Gray in conclusion says: The plaintiff must "be left, so far as the aid of a court of justice is requisite to secure the rights conferred by the mortgage, to the appropriate remedy of a writ of ejectment or a bill of foreclosure." If it is desirable to make the remedy by ejectment "summary" a rule of this court could probably be adopted similar to Law Rule 19, and made applicable to suits in ejectment.

If (second) the Saulsbury Resolution confers upon new purchasers of premises a new or additional right without providing a remedy, the plaintiff must adopt the appropriate remedy at law or in equity as the case may be, and if there be no appropriate remedy at law, then his relief is in equity. Upon this point in the case of Stone *vs.* Chisholm, 113 U. S., 302, 28 L. Ed., 991, the U. S. Supreme Court say:

> (pp. 308, 309 L. Ed., 993). "But we deem it unnecessary to consider and decide that question, because no special remedy being prescribed by statute for enforcing the liability defined by that section, from a consideration of its nature and the circumstances which are made the conditions of it, we are led to the conclusion that the only appropriate remedy in the courts of the United States is by a suit in equity."

To the same effect is the case of Horner *vs.* Henning, 93 U. S., 288, L. Ed., 879.

The purchaser has to prove his title by introduction of his deed in evidence, as well as to offer other proof as to the necessity of his having the property, which is just what he is not permitted to do in a landlord and tenant proceeding. Ray *vs.* Cotter, 29 Calif., 168.

In the next above cited case (Ray *vs.* Cotter) it is said:

> "Hence, before he can recover he must prove his purchase from the defendant's lessor by the production of a deed sufficient in law to pass the estate, and must prove its execution and delivery; or, in other words, he must prove his title, which is precisely what he is not allowed to do in this form of action" (landlord and tenant proceeding).

It is a recognized rule of practice in the summary proceedings of landlord and tenant that no evidence as to the title shall be permitted. Congress not having provided or authorized any different rule in a case where the facts are as in the case at bar, it follows that the landlord and tenant proceedings is not the proper or appropriate remedy for the plaintiff to pursue. If the plaintiff has no complete remedy in the landlord and tenant proceedings, or in ejectment, then it would seem that his remedy is in equity, under the authority of the two U. S. Supreme Court cases next above cited.

The other points of law and of fact covered by the assignments of errors, are sufficiently stated upon the record, and are not waived by failure to specifically repeat them in this brief.

We respectfully submit that the judgment should be reversed upon the grounds herein stated.

CHAPIN BROWN,
C. B. BAUMAN,
Attorneys for Plaintiff in Error.

FILED
MAR 7 1921
JAMES D. MAHER

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 379.

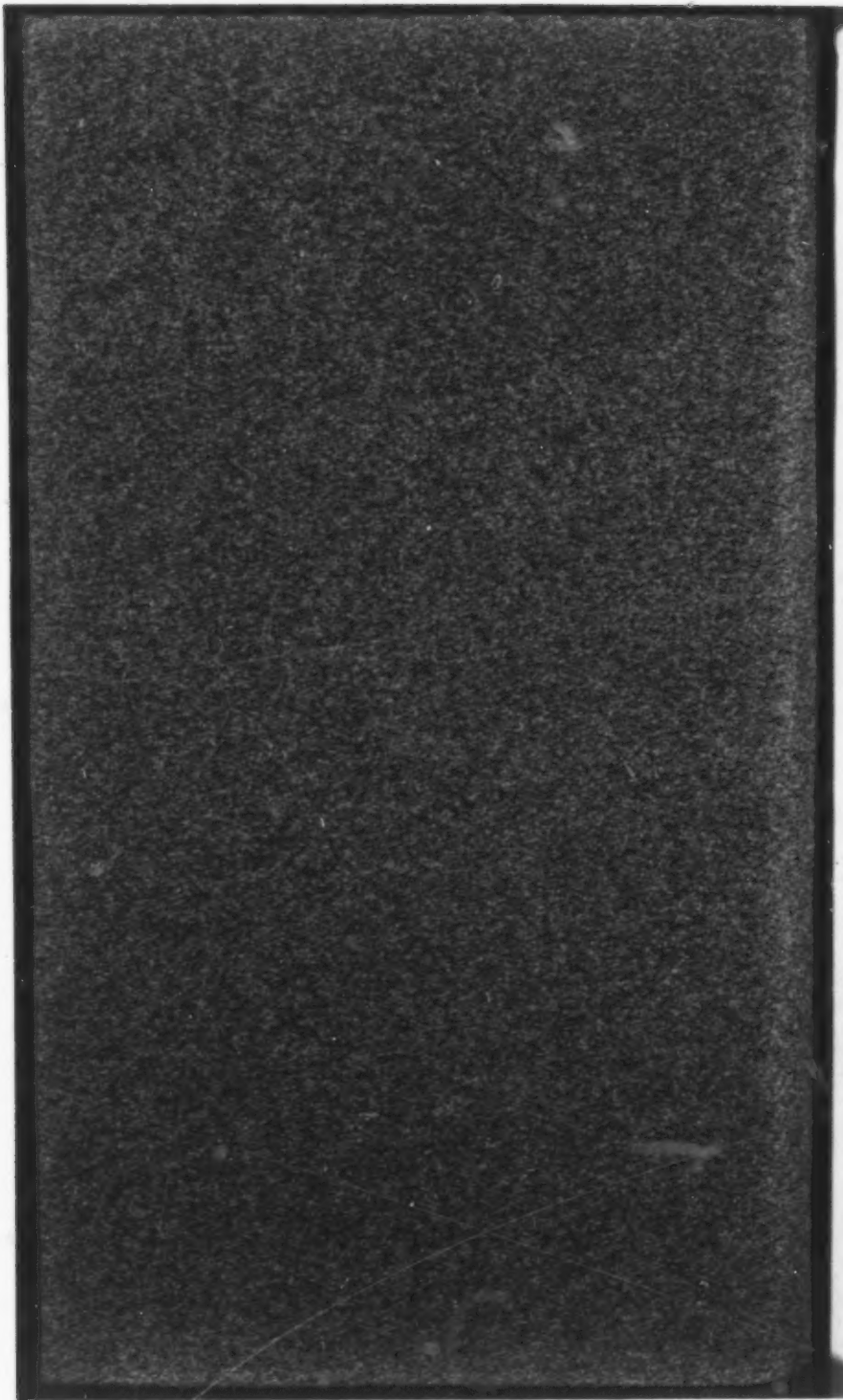
ANNA METTAUER, Plaintiff in Error,

vs.

BENJAMIN STOKES.

BRIEF OF REMARKS OF DEFENDANT IN ERROR.

WHARTON E. DEITZ,
Attorney for Defendant in Error.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 279.

ANNA HEITMULLER, PLAINTIFF IN ERROR,

vs.

SYLVANUS STOKES.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

Statement of Facts.

Suit was instituted in the Municipal Court of the District of Columbia by defendant in error (hereinafter designated "plaintiff") to recover possession of premises number 1505 22d street northwest, in the city of Washington, at that time occupied by plaintiff in error (hereinafter designated "defendant") as a tenant "by the month." After trial, judgment was entered in that court in favor of the defendant. Plaintiff appealed to the Supreme Court of the District of Columbia, where he filed an affidavit in compliance

with the provisions of law rule numbered 19 of that court, which is as follows:

> "Summary Judgment on Affidavit.—Within ten days after the docketing of an appeal from a judgment of the municipal court in a landlord-and-tenant proceeding and the service of the summons upon the appellee or the entering of his appearance in the cause, the plaintiff or his agent may file an affidavit setting out the grounds upon which he claims possession of the premises described in the complaint. A copy of such affidavit shall be served upon the defendant or his attorney of record and the plaintiff shall be entitled to a judgment against the defendant for possession of the property described in the complaint and costs unless the defendant shall within ten days after service of copy of said affidavit file an affidavit of defense denying the right of the plaintiff to the possession of the property in question and specifically stating in precise and distinct terms the grounds of his defense, which must be such as would, if true, be sufficient to defeat plaintiff's recovery."

As shown by plaintiff's affidavit, defendant occupied said premises under an agreement, dated September 4, 1912, originally entered into by her with the Washington Loan and Trust Company, whereby they were let to her "by the month" and wherein it was provided, *inter alia*, that if no default occurred on her part in the fulfillment of the terms thereof she should be entitled to not less than thirty days' written notice to vacate (Rec., p. 4).

This agreement was duly assigned by the Washington Loan and Trust Company to the New York Real Estate

Brokers, to whom defendant paid rental for some months. Under date of October 4, 1918, the New York Real Estate Brokers duly assigned the agreement to the plaintiff (Rec., p. 6), who thereafter gave the defendant due notice to quit.

Defendant filed an affidavit setting forth the grounds of her defense. Upon motion, the said supreme court entered judgment for the plaintiff for possession of the premises because the defense set forth by the defendant was insufficient, if true, to defeat plaintiff's recovery. From this judgment defendant appealed to the Court of Appeals of the District of Columbia, where the judgment was affirmed, and a writ of error was allowed to this court.

Subsequently plaintiff sold the real estate and is not now entitled to possession of the property. The principal questions involved in the case while it was pending in the courts of the District of Coumbia are now moot questions. The chief question now involved in this appeal is that of costs, amounting to probably less than fifty dollars. Plaintiff can recover for use and occupation of the property while he owned it, whether or not the conventional relation of landlord and tenant existed between himself and the defendant and can lose nothing but costs if the courts of the District of Columbia have erred.

BRIEF AND ARGUMENT.

I.

Defendant's first assignment of error is that the courts of the District of Columbia committed error in holding unconstitutional the public resolution of Congress entitled "Joint resolution to prevent profiteering in the District of Columbia," approved May 31, 1918, commonly called the "Salisbury Resolution."

That question will have been argued and probably decided before this cause is heard; therefore no argument will be attempted here.

The constitutonaliity of that resolution is not necessarily involved in this case, for plaintiff is within its provisions. He avers that he bought the premises for the *bona fide* occupancy of himself and family; that he took title thereto by deed duly recorded; that defendant occupied them under a "monthly agreement," which was duly assigned to him; that his object in purchasing the property was to obtain a home, the premises he had formerly occupied having been taken by the United States for "War workers;" that he was wholly unable to rent premises in which to live; that he had lived at a hotel for a number of weeks, his wife going out of the city to reside temporarily with his married daughter; that he and his wife are now residing in an apartment, which was sublet to him temporarily, under an agreement by him to surrender to his lessor upon her return to the city, which return was imminent; that he had no other premises and knew of none he could obtain in which to reside, and that

he was in immediate need of the property for his own occupancy.

Plaintiff shows that he bought the property for his own occupancy and is therefore within the exception in the "Salisbury resolution." He states facts showing his need for the premises. His allegations are not successfully controverted. Defendant's attorney apparently thinks it necessary for plaintiff to plead that he "necessarily requires" the premises. No such averment or proof is necessary under said resolution by a *bona fide* purchaser for his own occupancy. By a landlord who is in the employ of the Government, under the Salisbury resolution, that question would be a matter of proof, not of pleading. No pleadings are required in the municipal court except those provided by rules promulgated for that court. Section 32 of the Code of Laws of the District of Columbia provides that the practice and forms of proceeding in trials in the municipal court shall be governed by rules of the Supreme Court of this District. That court promulgated a form to be used in summary proceedings (Form No. 4, Rules of the Municipal Court), which was followed by plaintiff. No other form of complaint has been promulgated for use in summary proceedings between landlords and tenants in the District of Columbia.

The affidavit of defense, it is true, alleges that "the plaintiff is not a *bona fide* purchaser for his own occupancy." Not resting upon that statement, which at most was a conclusion concerning which defendant neither could have had, nor professes to have any personal knowledge, she modifies it by stating that "some of the facts" tending to prove the same, which facts alone, and others stated to be of a similar character and not disclosed, the defendant states she expects to

prove at the trial. These alleged facts are in substance that the plaintiff is a person of large property interests, that within a year he had sold an apartment house to the United States Government, that he owns two others and is building a third, that he is now occupying an apartment in one of these apartment houses, and that the premises sought to be recovered in the action are not fitted for occupancy by a person of the plaintiff's financial means and social station, etc.; which alleged facts, the only facts which the defendant claims that she expects to prove, are altogether insufficient to traverse the direct and specific allegations of the plaintiff's affidavit that he is a *bona fide* purchaser of the premises, that he bought them for the occupancy of himself and family, that his occupancy of the apartment referred to in his affidavit was pursuant to a temporary arrangement with the lessee thereof and was to be vacated upon her return to the city, which was imminent, and that he had no other premises and knew of none which he could obtain in which to reside, all other property owned by him in the city being under lease and possession of any part of it unobtainable during the existence of the war.

2, 3, 4, 5, 6, and 7.

Defendant's second, third, fourth, fifth, sixth, and seventh assignments of error are to the effect that Rule 19 of the Supreme Court of the District of Columbia is unconstitutional and void.

This rule is a most important and desirable rule, of equal importance with Rule 73 of that court. No good reason can

be given why a defendant in these summary proceedings should be permitted to avail himself of the delay afforded by a trial if he is unable to state a defense under oath. The rule requires nothing more. The same arguments, sufficient to establish the validity of the 73d rule of that court, are applicable here. No distinction in principle can be made between the two rules. Both are to prevent delay if there is no defense. Rule 73 provides:

> "Summary Judgment on Affidavit.—In any action arising *ex contractu*, if the plaintiff or his agent shall have filed, at the time of bringing his action, an affidavit setting out distinctly his cause of action, and the sum he claims to be due, exclusive of all set-offs and just grounds of defense, and shall have served the defendant with copies of his declaration and of said affidavit, he shall be entitled to a judgment for the amount so claimed, with interest and costs, unless the defendant shall file, along with his plea, if in bar, an affidavit of defense, denying the right of the plaintiff as to the whole or some specified part of his claim, and specifically stating also, in precise and distinct terms, the grounds of his defense, which must be such as would, if true, be sufficient to defeat the plaintiff's claim in whole or in part. And where the defendant shall have acknowledged in his affidavit of defense his liability for a part of the plaintiff's claim as aforesaid the plaintiff, if he so elect, may have judgment entered in his favor for the amount so confessed to be due. After taking such final judgment for the amount so confessed, the plaintiff shall have the right to prosecute the remainder of his claim in that suit and (if he sustains his claim for such remainder) to have a further final judgment therefor."

That rule has been held constitutional by this Court in Fidelity and Deposit Company *vs.* United States, 187 U. S., 315.

8.

Defendant's eighth assignment of errors attempts to present the question whether or not the plaintiff (concededly the owner of the property), as assignee of the rental agreement under which defendant occupied the premises, may maintain summary proceedings to obtain possession thereof. In other words, is the plaintiff the landlord of the defendant or may he maintain this suit?

Defendant contends that plaintiff did not become her landlord by acquiring the title to the property and by taking an assignment of the rental agreement, and therefore is not entitled to the benefit of the statute regulating proceedings between landlord and tenant.

Plaintiff had the fee to the real estate and all the rights and title defendant's original landlord had and could assign.

It is submitted that defendant is estopped from denying plaintiff's right to maintain this suit. She appeared in the municipal court and submitted to a trial therein without proper objection to the capacity of the plaintiff to maintain the suit. She contended, as she now contends, that the assignment of the rental agreement was ineffectual to create the plaintiff her landlord without attornment by her. This in effect was claiming title in another than the plaintiff—namely, in the New York Real Estate Brokers, to whom she had attorned, and who was plaintiff's assignor.

The municipal court was without jurisdiction to try a case

where title to real estate was involved. Section 23 of the Code for the District of Columbia, provides:

> "If upon the trial the defendant pleads title to the premises, in himself, or in another under whom he claims, setting forth the nature of said title, under oath, and shall enter into an undertaking, with sufficient surety, to be approved by the justice, to pay all intervening damages and costs and reasonable intervening rent for the premises, the justice shall certify the proceedings to the Supreme Court of the District of Columbia, and the same shall be further continued in said court according to its rules."

Rule 7 of the Municipal Court provides:

> "Every plea of title interposed in a proceeding for the recovery of possession of real estate shall be in writing under oath, and accompanied by an undertaking to be approved, within four days thereafter, by the court."

Defendant did not avail herself of the provisions of this law and did not comply with the requirements of this rule. She elected to chance a trial without proper objection to the plaintiff's right to maintain the suit. It was thereafter too late for her to make such objection, which, when made, was not in accordance with the requirements of either the statute or the rule of court.

The municipal court had jurisdiction of the subject-matter and of the parties. Had defendant filed a plea of title in another, that court would have been without further jurisdiction, except to certify the case to the Supreme Court of the District of Columbia.

It is submitted that the assignee of a landlord may maintain summary proceedings to obtain possession of real estate without attornment by the tenant. Attornment has long since been abolished (4 Anne, ch. 16, sec. 9; 20 Eng. Law & Eq. Rep., 94; Alexander's British Statutes, 660, 661; Funk's Lessee *vs.* Kincaid *et al.*, 5 Md., 404). The object of summary proceedings is to obtain possession of property held by one not entitled to it. It cannot be that the right of possession is dependent upon the consent of the person sought to be ejected. In Brown *vs.* Slater, 23 App. D. C., 57, it is said:

> "It cannot be that an act of Congress provided to meet an intolerable evil arising out of dishonest purpose to maintain the possession of real estate after the right of possession has ceased, can be made dependent for its efficacy upon the consent of the very person whose dishonesty it was intended to obviate."

Our statute does not provide, in terms, that the "assignee" of a landlord named in a rental agreement may maintain summary proceedings, but its meaning is clear, its object well known and its interpretation undisputed until now. The section of the Code applicable is as follows:

> Sec. 20. "Whenever any person shall * * * unlawfully detain possession of the property leased to him, after his tenancy therein has expired * * * it shall be lawful for any justice of the peace, *on complaint under oath of the person aggrieved by said unlawful detention,* to issue a summons to the party complained of," etc. (Italics supplied.)

The language used shows an intention not to limit summary proceedings to the original landlords. It includes "the

person aggrieved," who is necessarily the person "entitled to the possession of the premises." This law, or one similar to it, has been in effect in the District of Columbia since 1864, when Congress passed the act found in the Revised Statutes of the United States relating to the District of Columbia, §684 of which reads as follows:

> "When forcible entry is made, or when a peaceable entry is made and the possession unlawfully held by force, or when possession is held without right, after the estate is determined by the terms of the lease by its own limitation, or by notice to quit, or otherwise, *on written complaint on oath of the person entitled to the premises,* to a justice of the peace, charging such forcible entry or detainer of real estate, a summons may be issued to a proper officer, commanding the person complained of to appear and show cause why judgment should not be rendered against him." (Italics supplied.)

The Supreme Court of the District of Columbia, in Spalding *vs.* Hall, 6 D. C., 124 (decided in 1864), probably because of the importance of having the then new law interpreted for the guidance of parties, said, among other things, p. 129:

> "One other question of some importance is raised in this case, as to what person or persons are entitled to resort to this summary proceeding to recover the possession of real estate. The first section uses the words 'landlord and tenant,' but the second section drops the word 'landlord' and says, 'on written complaint on oath of the *person entitled to the premises,*' application may be made, &c. If this language be understood in its broadest acceptation, it would seem to imply that any one who had a legal title to the

> premises held by the tenant, might institute this summary proceeding to recover possession, whether that title was derived from the actual landlord, or from some other source. Obviously, that cannot be the intent and meaning of this language; for, if so, it would at once subvert the common-law action of ejectment, and substitute this summary proceeding in its place. The use of the words *'person* entitled to the the premises,' instead of the word 'landlord', as in the first section, evinces an intention on the part of the legislature to extend this summary remedy beyond the actual lessor or landlord.
>
> "The true intent and meaning of the legislature was (I think) to extend this remedy to all persons who, by the act of the lessor or by operation of law, are placed in the same relations to the tenant as the original lessor, to wit, the grantees or assignees, devisees and heirs-at-law of the lessor."

This opinion has been held to be the law in the District of Columbia since it was rendered, and has been followed in innumerable cases before justices of the peace in the Municipal Court and in the Supreme Court. Section 20 of the Code is practically the same as section 684 R. S. D. C., quoted. They differ in some respects, changes having been made to meet other conditions. It is submitted that no change was made in the meaning of the law on the question now presented.

The interpretation so given the law quoted became a settled legal principle governing the right to recover and the method of obtaining possession of real estate when unlawfully held in this District. It settled the law directly applicable to the title to property, or to be more exact, to the completion of the title of property, by obtaining possession.

The decision has been acquiesced in until now. A rule of property which has stood for more than half a century is not lightly to be overthrown. Titles to real estate have been taken, the title to the real estate in question was taken, upon the faith of that decision.

Upon questions of practice, courts will not be disposed to question, under any circumstances, decisions of courts having final jurisdiction. Hutchins *vs.* Maneely, 11 D. C. App., 88; Overland Motor Co. *vs.* Alexander, 43 App. D. C., 282; Ambrose *vs.* Brown, 42 App. D. C., 33.

R. S. D. C. §684 provided that the complaint should be "on oath of the person entitled to the premises" * * *. The provision of the present statute is that the complaint shall be "under oath by the person aggrieved by said unlawful detention." Each specifies the conditions under which summary proceedings may be instituted, and refers in the one case to the person "entitled," in the other to the person "aggrieved.' It would seem that no distinction can be made between the two statutes on this point. It cannot be that Congress intended in the one case to allow "the person entitled to the premises" to recover possession, whether the original landlord, or a purchaser from him, or the assignee of the nominal or other landlord, and by the subsequent law to limit the "one aggrieved by" the unlawful detention to the original landlord. If the two acts can be construed to have the same meaning and application they should be. It will be conceded that the law should be interpreted as in the past if it can be.

To hold that a landlord may not assign his interest under a rental agreement, to become wholly effective, would place a restraint on the power of alienation contrary to public

policy. The tendency of legislation is to favor alienation and assignments. Sec. 433 of the Code authorizes the assignment of all non-negotiable written agreements for the payment of money, which would include rental agreements as far as they relate to the collection or payment of rent. An anomolous condition would be presented if the assignment of a rental agreement is good for one purpose, yet not good for another; good for rent, but not good for the recovery of possession, yet good for that purpose if once the tenant consents (attorns) by paying rent or otherwise. Certainly a rental agreement may be assigned by a landlord so as to divest all his interest, independent of the question whether such disposition of his entire interest would create the assignee the landlord of the tenant.

It will be noted that the defendant, by the terms of her lease, recognizes and assents to the assignment thereof to be effective as against herself. She stipulates that she "will not sublet or assign the said premises or carry on any business therein, except that of dwelling, without the written consent of the said lessor, its successors, *or assigns;*" that, upon her failure to comply with its terms, the "lessor, its successors and *assigns,* shall and may proceed to recover possession of said premises under and by virtue of a seven-days' summons as provided by law;" and that, though there should be no default on her part, she shall be entitled to not less than thirty days' notice in writing to vacate, and "the said lessor, its successors and *assigns* shall be entitled to the same notice from the lessee, should she desire to vacate the aforesaid house and premises." She attorns, in advance, to the successors and *assigns* of her lessor.

Undoubtedly the conventional relation of landlord and

tenant must exist before summary proceedings may be invoked. In many States statutes provide that this remedy may be had by landlords, their heirs, personal representatives and assigns. Our statute does not in terms include the "assigns" of the original landlord, but, as above pointed out, employs language which the court of the then highest jurisdiction held to be equivalent thereto by a decision which it is now for the first time sought to be challenged after the lapse of more than half a century.

Section 1234 of the Code of the District of Columbia provides:

> "Assignee of Reversion.—The grantee or assignee of the reversion of any leased premises shall have the same right of action against the lessee, his personal representatives, heirs or assigns, for rent or for any forfeiture or breach of any covenant or condition in the lease which the grantor or assignor may have had; and the assignee of the lessee shall have the same rights of action against the lessor, his grantee or assignee, upon any covenant in the lease which the lessee may have had against the lessor."

Under this law assignees of the reversion may maintain summary proceedings. The affidavits show that the plaintiff acquired all the outstanding title to the property, by a deed conveying the fee and by an assignment of the rental agreement. These conveyances include any reversion that may have existed in the original landlord of the plaintiff, whether it was owner or agent of the owner. As plaintiff holds the fee, he necessarily acquired all outstanding reversions.

Independently of section 1234 of the Code, 4 Anne, ch. 16, sec. 9, contained in Alexander's Brit. Statutes in force

in this District, p. 427, star, p. 324, which will also be found at p. 496, sec. 31, of Abert's Compiled Statutes, would seem to be conclusive of the defendant's contention that attornment by her was necessary to create the relation between the plaintiff and herself necessary to the maintenance of the present proceeding. It provides that

> "All grants or conveyances thereafter to be made, by fine or otherwise, of any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good and effectual, to all intents and purposes, without any attornment of the tenants of any such manors, or of the land out of which such rent shall be issuing, or of the particular tenants upon whose particular estates any such reversions or remainders shall and may be expectant or depending, as if their attornment had been had and made."

Defendant's claim is unlike that of appellant in Willis *vs.* Trust Co., 169 U. S., 303, the claim there being that, the owner, a mortgagor in possession after default, was never a tenant of the mortgagee. Defendant never had any relation to the property in question except that of a tenant, and her claim is, that she is not the tenant of one who has become the purchaser of the property of which she is a tenant and who is the assignee of her lease, because she has never attorned or paid rent to him; a proposition untenable, it is submitted, both because of 4 Anne, ch. 16, sec. 9, abolishing attornment and placing the tenant and the new owner in the same relation to each other as though the lease had been made between them and because, as above pointed out, by her lease she recognizes and contracts with the successors or *assigns* of her lessor quite as fully as with her lessor itself.

If not tenant of the purchaser of the property and of the assignee of the lease, whose tenant is defendant? Not of the former owner of the property, or of her original lessor, who have vested all their right, title, estate and interest in it in the plaintiff, and who is her landlord, unless in some unexplained way she has acquired some other relation to the property than that of tenant under her lease.

It is contended that this court in Sheets *vs.* Selden, 2 Wall., 180, held that the law from which section 1234 of our Code is said to have been derived, related only to instruments under seal, and that the rental agreement under consideration is not under seal. A complete answer is that, though the section of the Code mentioned may be derived from the act referred to in that case, the language is not the same.

In Sheets *vs.* Selden this court says that under 32 Henry VIII, ch. 28, the grantee of a reversion could enter or bring ejectment only when the lease was under seal, but, in terms, based that contention on the fact that that statute referred only to conditions, covenants and agreements "contained in *indentures* of leases, demises and grants," the term indentures being applicable only to sealed instruments; but, notwithstanding that contention, the court overruled the contention in that case which is made here, on the ground that the Indiana statute extended the remedies given by 32 Henry VIII, ch. 28, to all leases. If it be true, as stated, that section 1234 of the D. C. Code "is taken from the statute of 32 Henry VIII, p. 34, secs. 1, 2," it nevertheless omits the word "indentures," the employment of which word in the statute of 32 Henry VIII was the sole ground for confining the remedies given by it to leases under seal. It provides that the grantee or assignee of the reversion "of *any* leased

premises," whether the lease be under seal or not, shall have the same right of action, etc., which the grantor or assignor might have had.

The original landlord, The Washington Loan and Trust Company, rented the premises to the defendant either as an owner, or as an agent of the owner. If it rented as an owner, then the averment in his affidavit that plaintiff is "a *bona fide* purchaser of said premises" is sufficient, in these proceedings, to show that all the title to the real estate, including any reversion, is now vested in him. If the company rented the premises as an agent for the owner the assignment is believed to be sufficient.

It will not be contended that the property of a lessor cannot be aliened without the consent of the lessee. It can be aliened by the voluntary act of the lessor, and it can be taken by process of law. It would be a novel proposition to say that a landlord may voluntarily alienate his interests under a rental agreement, or that such interests may be taken by process of law, but that the tenant is not bound to recognize such alienation, whether voluntary or involuntary. All others must recognize such alienation; why not the tenant?

In Barton *vs.* Learned, 26 Vt., 196, "the person who is entitled to the possession," was held to include an assignee of the rental contract. It cannot be seriously contended that Congress intended to limit the operation of the law as it now appears in our Code. On the contrary it appears that Congress intended to enlarge it, to include not only what was included in the old law, but other conditions.

Taylor on Landlord and Tenant, sections 425 and 720, and notes to 720 will assist in the proper interpretation of our law.

"Sec. 425. The rights and liabilities of the respective parties to a lease * * * are not confined to the immediate parties thereto, but will be found to attach to all persons, to whom the estate may be transferred, or who may succeed to the possession of the premises, either as landlords or tenants. This result follows as a necessary consequence of that privity of estate which we have seen is incident to the relation of landlord and tenant, and which carries with it all these obligations which the original parties agreed should attach to and and continue to regulate that relation."

"Sec. 720. *When proceedings lie.* * * * It applies, however, in favor of assignees of the reversion, as well as of the lease, for they succeed to all the rights of the original landlord." * * *

The note to this section collects numerous authorities. The subject is also discussed in Tiffany on Landlord and Tenant, §273.

The question is important. A change in the interpretation of the law would be disastrous, and would paralyze real estate transfers in the District of Columbia until relief could be had from Congress. An owner of rented real estate could not sell it without the consent of his tenant. Under present conditions probably few tenants would consent. Alienation of property would be unwarrantably restricted. It is a matter of common knowledge that a large majority of the dwelling-houses in the District of Columbia are under rental. It is also matter of common knowledge that the large majority of those under rental are rented under "monthly agreements," and that a very large majority of rented houses are rented by agents, in their own names, rather than in the names of the owners. The result of a decision holding that

an agent could not effectively transfer an unsealed monthly rental agreement would doubtless affect a very large majority of the tenancies existing in this District. Property rented by agents and property rented by owners would both be affected. If an owner of real estate sold it, the tenant, by refusing to recognize the purchaser as his landlord, could refuse to pay rent and require the new owner to proceed by ejectment or otherwise. An owner of rented real estate could not change rental agents unless the tenants were pleased to recognize the new agent as his landlord. The latter could not displace his agent and collect his own rents if an assignment of the agreement be ineffective. If an assignment is insufficient to enable the owner or assignee to maintain summary proceedings, it is difficult to see how it can be sufficient to enable him to enforce any of its conditions, including the payment of rent. The Salisbury resolution in terms excepts from its operation a *bona fide* purchaser for his own occupancy. If it be necessary for a tenant to acknowledge the purchaser or the assignee of a rental agreement, by the payment of rent or otherwise, before the purchaser or assignee becomes a landlord, then the now obsolete doctrine of attornment is revived.

These comments are made principally to show how unfortunate it would be to disturb a decision of the then highest court, which has been followed for more than fifty-seven years, and may be said to have become a rule of property. It cannot be known how often the question has been raised and decided. There are no reported decisions other than the one cited, but, if the law be as defendant claims, thousands of judgments in the District of Columbia have been erroneous, many of them in the Supreme Court, and a still

larger number by justices of the peace and the Municipal Court, in which latter court more than 167,000 landlord-and-tenant cases have been instituted since that court was organized in 1910, as appears by the number given this case in that court.

The case of Willis *vs.* Eastern Trust and Banking Co., 169 U. S., 303, held that the conventional relation of landlord and tenant must exist before these summary proceedings could be invoked. In that case it was held that a mortgagor of property was not a tenant. The relation of landlord and tenant was not contemplated by the mortgagor or the mortgagee. The former was never a tenant to any one. In the instant case the defendant is concededly a tenant. The conventional relation of landlord and tenant did exist with regard to the property in question, and the question is, not if such relation existed, not if defendant is a tenant, but is plaintiff in such position that he may avail himself of the summary remedy afforded landlords?

In the last-cited case the Supreme Court concluded that the law then under consideration was probably copied from Massachusetts statutes and said:

> "This being so, the known and settled construction which those statutes had received in Massachusetts before the original enactment of the act of Congress must be considered as having been adopted by Congress with the text thus expounded."

Several Massachusetts cases decided before 1864 are authority for the statement that, the relation of landlord and tenant being once established by convention, a purchaser from the landlord, after giving notice to the tenant or his assigns, if notice is necessary, may lawfully proceed under

the Massachusetts statutes providing summary proceedings in cases between landlord and tenant; and these decisions are not inconsistent with the decision in Willis *vs.* Eastern Trust and Banking Company, or with any authority therein cited, because the only question decided by that case relates to the situation of mortgagor and mortgagee and not to that of a tenant who is sued by a purchaser or assignee claiming under the landlord.

Benedict *vs.* Morse, 51 Mass., 9 Metcalf, 223-227.
Howard *vs.* Merriam, 59 Mass., 5 Cushing, 563.
Hayden *vs.* Ahern, 75 Mass., 9 Gray, 438.

In Benedict *vs.* Morse, *supra,* the defendant was a tenant at will, paying rent to certain trustees who had the right of possession and power of sale of the property in question, until the survivors of said trustees sold and conveyed the property to one of the plaintiffs, who conveyed a one-half interest to the other plaintiff. The plaintiffs did not receive or demand any rent, but began summary proceedings for possession after notice. The tenant made several defenses, one of which was that he was entitled to three months' notice. It was held that the sale by his landlord (the trustees) terminated his tenancy, and that the plaintiffs, being the persons entitled to the possession by virtue of their purchase, could maintain the action without previous notice.

In the Howard *vs.* Merriam, *supra,* the defendant was originally a tenant under a parol agreement of one Goodrich, who conveyed the property to the plaintiff without having accepted rent, gave the defendant written notice to quit forthwith and was held entitled to recover possession.

Chief Justice Shaw, who delivered the opinion in that case, reviewed all previous reported Massachusetts cases bearing

on the matter and the several acts of the legislature are referred to and commented on by him. The text of the statute in force (ch. 104, sec. 2) is quoted at page 507. He considered and decided the question as to who was entitled to have the summary process as plaintiff, and held that either the original landlord or his assignee or grantee was entitled to such process. He further said:

> "In case of alienation, therefore, though there is no relation of landlord and tenant between the lienee and the tenant at will (the alienation having terminated the tenancy), yet this process may be maintained." 583-584.

The reason is that the statute provided that the person entitled to the premises may be restored to the possession. The opinion is a very satisfactory and learned discussion on the scope of the summary proceedings now in question.

Hayden *vs.* Ahern, *supra,* is the case of a purchaser suing a tenant of the former owner with whom he had not established by direct contract, by or assignment from the former owner of any lease, the relation of landlord and tenant. The court said:

> "This appears to be a clear case. The defendant was tenant at will (by parol agreement) to White. White conveyed in fee to Whiting, which had the effect of terminating the tenancy. Whiting had the fee and full right of possession, and if the defendant continued in possession it was as his tenant at will. By the conveyancing in fee by Whiting to the plaintiff the tenancy at will of the defendant was terminated, and plaintiff had the right to enter. He did enter and, defendant having refused to surrender, he began this process, which he had a right to do."

In the above cases there were no assignments to the plaintiff of any lease. In the case at bar there is such an assignment from the original landlord to the New York Brokers' Association, and by the latter to the plaintiff, and it is submitted, the plaintiff had a right to this process against the defendant as such assignee, both as a legal proposition and under the plain terms of the lease, having given the defendant due notice to quit, in addition to his right to maintain the action as the "person aggrieved" or as the "person entitled" to the possession of the property.

It was made known to the Court of Appeals of the District of Columbia that after the opinion rendered by that court the plaintiff sold and conveyed the real estate. As nothing remained in the case of special interest to the plaintiff except to recover damages for detention of the property and his costs, a motion was made to dismiss the writ of error theretofore granted (Rec., p. 19). Subsequently a similar motion was filed in this court and was continued until the final hearing of the case.

As plaintiff is no longer owner of the property, he will not be entitled to a writ of restitution. He has a right to recover either rental under the agreement or for use and occupation of the premises during the time which has elapsed since judgment was rendered, whether or not the courts of the District of Columbia committed error, leaving nothing for him to gain except costs and the right to recover for rent, or for use and occupation, on the appeal bond. The costs recoverable will probably not amount to fifty dollars.

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

WHARTON E. LESTER,
Attorney for Defendant in Error.

but would lay the costs of this writ of error upon the defendant in error and reverse the judgment with instructions to dismiss the complaint. P. 361.

49 App. D. C. 391; 266 Fed. Rep. 1011, reversed.

THE case is stated in the opinion.

Mr. Chapin Brown, with whom *Mr. C. B. Bauman* was on the brief, for plaintiff in error.

Mr. Wharton E. Lester for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

Sylvanus Stokes brought suit in the Municipal Court of the District of Columbia to recover from Anna Heitmuller possession of premises number 1505, 22nd Street, Northwest, in the City of Washington, D. C. Stokes claimed to be the purchaser of the premises, and the action was brought against Anna Heitmuller as tenant thereof. Trial was had in the Municipal Court, and judgment rendered in favor of the defendant. Stokes appealed to the Supreme Court of the District of Columbia, and filed an affidavit after the docketing of the appeal as required by Rule 19 of that court. Defendant filed an affidavit setting forth grounds of defense. The Supreme Court entered judgment for the plaintiff, Stokes, upon the ground that the defense as set forth by the defendant was insufficient to defeat the plaintiff's recovery. The case was taken to the Court of Appeals of the District of Columbia, where the judgment of the Supreme Court was affirmed. 49 App. D. C. 391. A writ of error brings the case to this court.

The errors assigned raise constitutional questions as to the validity of the so-called Saulsbury Resolution (40 Stat. 593), and of Rule 19 of the Supreme Court of the District of Columbia. Other errors, not necessary to notice, are also assigned.

The judgment of the Court of Appeals of the District, affirming that of the Supreme Court, was rendered on January 5, 1920, and on January 15, 1920, a writ of error was allowed bringing the case to this court. On February 9, 1920, Stokes, appellee in the Court of Appeals, and defendant in error here, filed a motion to dismiss the writ of error upon the ground that he had sold and conveyed the real estate, the possession of which was the subject-matter in dispute, and had no further interest in the cause except to recover costs and rental due because of the wrongful detention of the property, and upon the further ground that no appeal bond had been filed by the appellant. The Court of Appeals denied the motion. After the allowance of the writ of error, the cause had passed beyond the jurisdiction of that court.

In this court the defendant in error, Stokes, moves to dismiss the writ of error, setting forth as grounds for the motion:

1. The cause of action between the parties hereto has ceased to exist, for that after the judgment of the Court of Appeals of the District of Columbia, appellee sold and conveyed the real estate, the subject-matter of this suit, and therefore is not now entitled to the relief herein sought, namely, the possession of said premises.

2. There is now no actual controversy involving real and substantial rights between the parties to the record, and no subject-matter upon which the judgment of this court can operate.

3. The only question now involved in this appeal is that of costs.

As the action was brought to recover the possession of real estate, and as the defendant in error has, pending review in this court, sold it, we agree with the contention that the case has become moot. The plaintiff in error, so far as the record discloses, is in possession, and the de-

fendant in error, having sold and conveyed the property, a judgment if in his favor will not give him possession of the premises. It has been often held that this court will not decide moot cases. The rule was stated in *Mills* v. *Green*, 159 U. S. 651, 653:

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence. *Lord* v. *Veazie*, 8 How. 251; *California* v. *San Pablo & Tulare Railroad*, 149 U. S. 308." See also *United States* v. *Hamburg-American Co.*, 239 U. S. 466, 476, and cases cited.

Where no controversy remains except as to costs, this court will not pass upon the merits. *Paper-Bag Cases*, 105 U. S. 766, 772.

It remains to be considered what order should be made. Although, owing to the moot character of the issue involved, we may not consider the merits, we are at liberty to make such order as is "most consonant to justice in view of the conditions and circumstances of the particular case." *United States* v. *Hamburg-American Co.*, *supra*, pp. 477, 478.

In the case now before us, without fault of the plaintiff in error, the defendant in error, after the proceedings below, practically ended the controversy by parting with title to the premises, thus causing the case to become moot.

In such case the costs incurred upon the writ of error should be paid by the defendant in error.

Reversed, and remanded to the Court of Appeals of the District of Columbia with direction to remand to the Supreme Court of the District of Columbia with instructions to dismiss the complaint.

HEITMULLER *v.* STOKES.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 279. Argued April 21, 22, 1921.—Decided May 16, 1921.

The defendant in error, having secured judgment for the possession of his real estate, sold the premises to a stranger, after the case had been removed to this court by writ of error, leaving the defendant in possession. *Held* that, as no controversy remained between the parties, except as to costs, this court would not decide the merits,